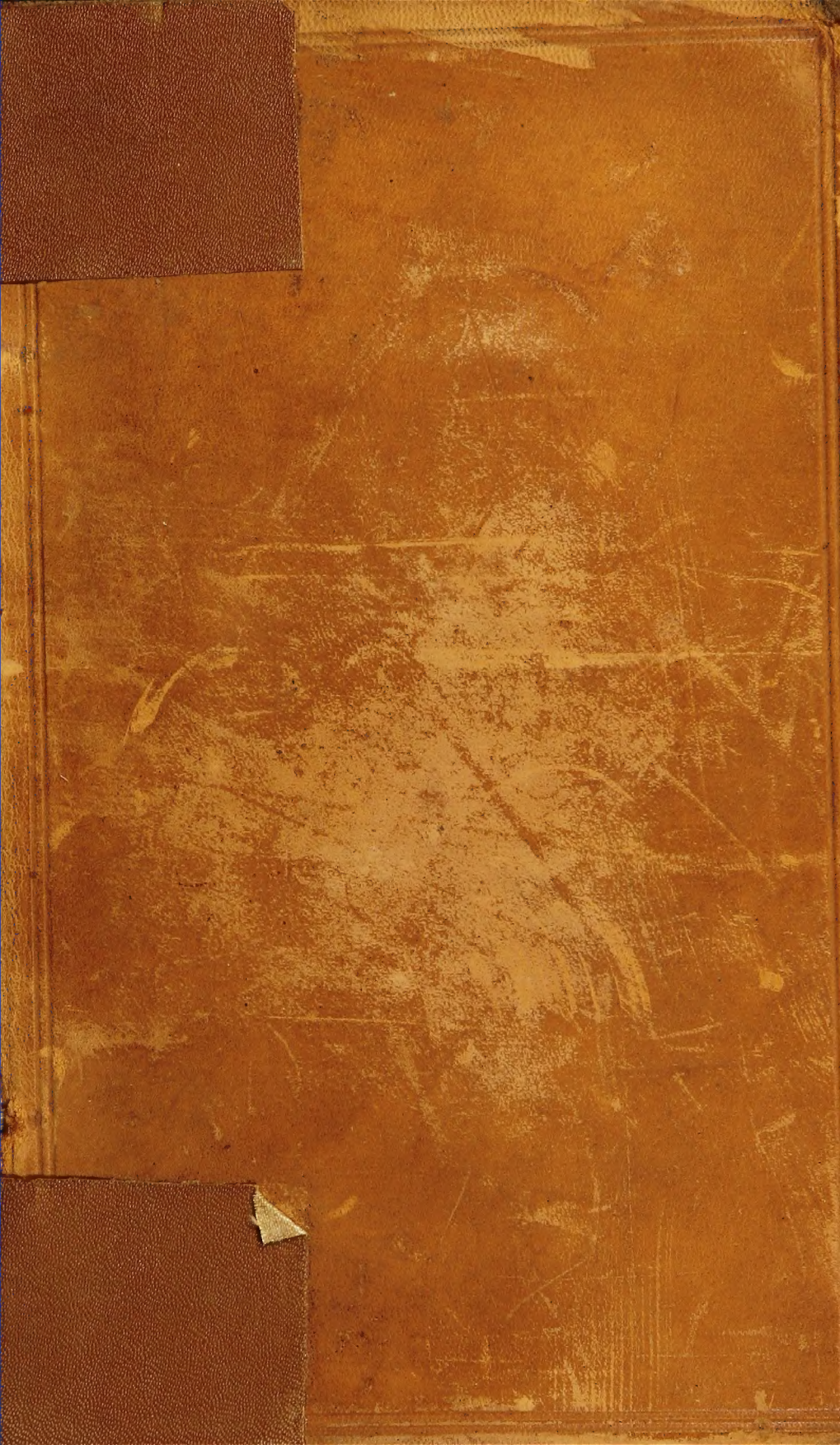




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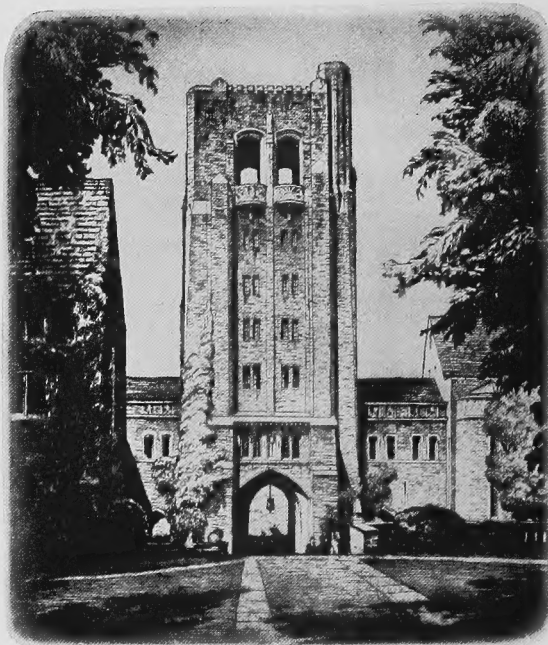
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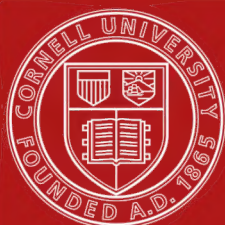


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A
PRACTICAL TREATISE
OF THE
LAW OF EVIDENCE.

By THOMAS STARKIE, Esq.,
OF THE INNER TEMPLE, ONE OF HER MAJESTY'S COUNSEL.

The Eighth American from the Fourth London Edition.

BY
GEORGE MORLEY DOWDESWELL,
AND
JOHN GEORGE MALCOLM, ESQUIRES,
OF THE INNER TEMPLE, BARRISTERS-AT-LAW.

WITH NOTES AND REFERENCES TO AMERICAN CASES,
BY GEORGE SHARSWOOD.

TOGETHER WITH THE NOTES TO FORMER AMERICAN EDITIONS,
BY THERON METCALF, EDWARD D. INGRAHAM,
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NOTE BY THE EDITOR
OF THE
EIGHTH AMERICAN EDITION.

OF the merits of Starkie on Evidence it is entirely unnecessary to speak. It has been too long and favourably known to the profession to require commendation. The Fourth English Edition has been adapted to the present state of the law in England. It is true that some of the alterations recently adopted by statute in that country have not yet been universally introduced into this. But it will not be long before they are. The experience of those states where the law of evidence has been simplified by the repeal of all arbitrary rules of exclusion speaks so loudly in favour of that reform, that the example must spread. The labours of former American Editors have been carefully retained, and notes and references to the more recent decisions have been added to bring up the work to the present time.

G. S.

JUNE, 1860.

ADVERTISEMENT

TO THE FOURTH LONDON EDITION.

THE Editors, in preparing for publication this edition of the first volume of Mr. Starkie's work, have used their best endeavors to render that volume, which contains the Principles of the Law of Evidence, perfect in itself and available for the purposes not only of the Student but also of the Practitioner. They have subdivided it into chapters, so as to render it more easy for perusal and reference. They have introduced into it those heads from the second and third volumes which relate to Parol Evidence and Presumptions, and have relieved it of much matter which more properly belonged to the Digest of proofs contained in those volumes. They have also added a copious Index, still retaining the full analysis of the matter contained in the Table of Contents, and have thus, they trust, rendered this volume as complete a Treatise in itself as the present state of the Law will permit.

PREFACE

TO THE FIRST EDITION.

THE investigation of truth, the art of ascertaining that which is unknown from that which is known, has occupied the attention, and constituted the pleasure as well as the business of the reflecting part of mankind in every civilized age and country. But inquiries of this nature are nowhere more essential to the great temporal interests of society than where they are applied to the purposes of judicial investigation in matters of fact. Their importance is obviously commensurate with the interests of justice and of right; the best and wisest laws are useless until the materials be provided upon which they can safely be exercised; in other words, the administration of a law assumes the truth of the facts or predicament to which it is applied.

With those who regard law as a science which rests on certain fixed and equitable foundations, and who view its decisions not as arbitrary precedents, but valuable only as they illustrate the great principles from which they emanate, this branch of jurisprudence, which comprises the rules and practice of judicial investigation, must exceed all others in point of interest. However widely different codes may vary from each other in matters of arbitrary positive institution, and of mere artificial creation, the general means of investigating the truth of contested facts must be common to all. Every rational system which provides the means of proof must be founded on experience and reason, on a well-grounded knowledge of human nature and conduct, on a consideration of the value of testimony,

and on the weight due to coincident circumstances. Here, therefore, the object of the law is identified with that of pure science; the common aim of each is the discovery of truth; and all the means within the reach of philosophy, all the connections and links, physical or moral, which experience and reason can discover, are thus rendered subservient to the purposes of justice. In different systems of law, the great principles on which the rules of evidence depend may be and are variously modified; but every departure from those principles, wheresoever it occurs, must constitute a corresponding and commensurate imperfection.

Notwithstanding, however, the universality of the great principles of the science, it is essential in practice to guard and limit the reception of evidence by certain definite and positive rules. Nature has no limits; but every system of positive law must, on grounds of policy prescribe artificial boundaries, even in its application to a subject which from its independent nature least of all admits of such restraint. These, however, are necessarily for the most part of a negative description, the effect of which is to exclude evidence in particular cases, and under special circumstances, on general grounds of utility and convenience; yet even here so difficult is it to prescribe limits on such a subject, without the hazard of committing injustice, that rules, the general policy of which is obvious, are by no means favoured. Thus, although according to the law of England, he who is interested is also incompetent to be a witness, yet the courts are ever anxious to apply the objection, as natural reason would apply it, to the credibility rather than to the competency of a party; to receive and to weigh his testimony, rather than wholly and peremptorily to exclude it. It is true, that in many instances the law may by rules of a positive nature annex a technical and arbitrary effect to particular evidence, which does not actually appertain to it. Thus, by our law, a judgment is frequently absolute and conclusive evidence of the facts which have been already contested; but one general observation is applicable to this and to most instances of a similar nature, including the numerous cases of legal presumption,

that they are not used as the means or instruments of truth, but are in virtue and effect nothing more than mere technical and positive rules, which are wholly independent of the principles of evidence, and whose only foundation is their general utility and convenience.

To go farther, and by any positive and arbitrary rules to annex to particular evidence any technical and artificial force which it does not naturally possess, or to abridge and limit its proper and natural efficacy, must in all cases, where the object is simply the attainment of truth, not only be inconsistent and absurd in a scientific view, but what is worse, would frequently be productive of absolute injustice. To admit every light which reason and experience can supply for the discovery of truth, and to reject that only which serves not to guide but to bewilder and mislead, are the great principles which ought to pervade every system of evidence. It may safely be laid down as an universal position, that the less the process of inquiry is fettered by rules and restraints, founded on extraneous and collateral considerations of policy and convenience, the more certain and efficacious will it be in its operation.

To pursue such general observations further in this place would interfere too much with the arrangement of the present work, the objects of which are now to be announced.

It is proposed in the following Treatise to consider the practice of the law in England on the subject of judicial proofs. With this view, the elementary principles, by which the admissibility of evidence to prove matters of fact before a jury is governed, will first be considered. A second division will contain an enumeration of the different instruments of evidence. In a third, the application of these principles and instruments to the purposes of proof will be considered, as also the distinction between law and fact, and the force and effect of direct and circumstantial evidence; and, lastly, the evidence essential to the proof of particular issues will be detailed, and references made to the leading decisions connected with the particular subject of proof.

Nothing can be more agreeable than to compare the Law of Evidence as it now exists, with the rude practice which formerly prevailed, when its principles were so dubious and unsettled, that the very means devised for the discovery of truth and advancement of justice were not unfrequently perverted to the purposes of injustice, and made the instruments of the most grievous and cruel oppression. Whoever institutes that comparison will find great reason to approve of the changes which have taken place; but no mistake can be more injurious to the law, as a system, or oppose a greater obstacle to all future improvement, than to suppose that the Law of Evidence has attained to its highest perfection. It is, however, far from the Author's present purpose to enter into any discussion on the subject of the imperfections and anomalies which yet encumber this branch of the law. To the learned judges of modern times the highest praise is due for the strenuous exertions which they have made to reduce the Law of Evidence to a system, founded on just and liberal principles; and it is to be hoped not only that those imperfections which still subsist, which have been spared from their antiquity, and exist as a kind of prescriptive evils, will in time be removed by legislative, if they be beyond the reach and scope of judicial authority; but that such other improvements will be made as reason exercised on mature experience shall warrant.

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LAW OF EVIDENCE.

INTRODUCTION.

EVERY system of municipal law consists of provisions, which either define primary rights^a and duties; or provide means for preventing or remedying the violation of them.

If all were both able and willing to fulfil the former provisions of the law, the latter would be unnecessary. But without provisions for *preventing* and *remedying* violations of the mandatory branches of the law, by imposing actual restraint in some instances, and annexing penal or remedial consequences to disobedience, in others, such laws would be of no greater, frequently *of less effect, than mere moral precepts. It is of the very essence of [*2 a municipal law, not only to prescribe a rule of conduct, but to compel obedience, either by actual restraint, or by annexing such consequences to disobedience as are on the whole the most convenient, so that any addition or excess would be productive of more evil than good.

Such provisions are either *preventive* or *remedial*.

* Right, in its primitive legal sense, is that which the law directs: in popular acceptation, that which is so directed for the protection or advantage of an individual, is said to be *his* right.

When it is said that *A.* has a right to an estate or to damages, it is meant, that under the circumstances the law directs that he shall have the estate or shall have damages. When it is said that *B.* has a right of action, it is meant, that the law under the circumstances provides means for enforcing his claim.

When the learned author of the Commentaries, in the language of the civil law, speaks of the *rights of things*, he uses the term in its primitive sense, and treats of those legal incidents which the law prescribes as to things, such as possession, enjoyment, succession, or transfer.

Preventive, which are devised for the actual prevention of violations of the law ;

Remedial, which are devised for the purpose of repairing the consequences of disobedience.

Preventive provisions, again, are either such as are designed to prevent violations of the law by interposing actual, forcible, corporeal restraint ; as where one is prevented by force from doing some special injury to the person or the property of another, or is restrained from doing mischief generally by imprisonment ; or they are such as operate on the mind by the fear of *penal consequences* annexed to defined transgressions.

Remedial, which afford a remedy or reparation in respect of some violation of right, consist either in awarding specific restitution, as by an actual restoration of goods wrongfully detained from the owner ; or in giving damages co-extensive with the particular injury.

In order to annex either remedial or penal consequences to their proper predicaments in fact, it is essential that the true state of facts should be *investigated* by competent means ; that the legal consequences appertaining to such ascertained facts, as previously defined by the law, should be declared by *judicial* authority ; and, lastly, that the legal consequences, if not already annexed, should be actually annexed by an *executive* process.

To the *investigative* process, again, it is essential that the parties should mutually state what each deems to be essential to his claim *3] or charge, or defence, and that each *should be allowed to dispute or deny the statement of his adversary. By this means, if any facts be disputed, they are distinguished from the admitted facts, in order to be submitted to inquiry before the proper tribunal.

These mutual statements are, in the law of England, styled the pleadings.

By that law, it is in the first place incumbent on the party who makes a claim or charge, to state facts which, if true, show that the charge or claim is founded in law : the defendant is then required either by a demurrer to admit the facts and deny the legal consequence contended for by the plaintiff or prosecutor, or to deny the facts so alleged, wholly or in part, *or*, admitting the fact so alleged to be true, to state others, which, taken in connection with the facts already stated, show that the claim or charge is unfounded in law.

Again, where such additional facts are pleaded in defence, it is for the prosecutor or plaintiff, in his turn, either to deny some material fact so pleaded in defence, *or*, admitting those facts to be true, either to demur, so as to raise a mere question of law, *or* to allege additional facts; and in like manner, so long as further facts are pleaded by the one party, the other may either deny one or more of such facts, or demur, or allege other facts. It is obvious that such a series of mutual allegations, where the condition is that each which does not terminate the series must contain the averment of some new and material fact, must rapidly converge to an issue either of law or fact.^b

^b The law, however, frequently sanctions a generality in pleading, which leaves the fact which is to be tried intermixed with most important legal considerations. For instance; the declaration in an action of trover alleges in substance nothing more than the conversion by the defendant of the plaintiff's goods; the defendant by his plea may deny that they were his goods; and this issue frequently involves not merely one or more simple facts, but difficult legal considerations, such as questions of title, the law of bankruptcy, the right of stoppage *in transitu*, and many others. It is obvious that such an intermixture of law and fact could not be avoided without the aid of minute and particular pleadings, in the course of which the real merits and justice of the case would frequently be embarrassed with difficulties, arising from a necessary adherence to technical rules.

It is interesting to observe how nearly the law of England corresponds with the ancient Roman law in several most important points of its practical administration. In the first place, the pleadings in the practice of the Roman law were transacted before the prætor, as they are with us in the courts above, or, as it is technically called, in Banc. The plaintiff, when he had brought his adversary into court, and had not agreed with him upon an *Impar lance*, then formally (*edebat actionem*) declared against him: "Quod si nec vindices dati, nec de lite in via transactum in jus venire solebat, ubi actor, impetrata loquendi potestate, reo edebat actionem, id est, indicabat qua demum actione adversus reum experiri vellet. Quum enim de uno eodemque facto plures sæpe actiones competere, eligenda erat una, eaque edenda reo."—Hein. A. R. v. 2, 226.

It must be allowed that, however our modern system of pleading may excel that of the Romans in other respects, the latter were at least entitled to the merit of conciseness; take, for instance, a declaration in *assumpsit* upon a special agreement. A Roman declaration in such a case ran thus: "Aio te mini triticum de quo inter nos convenit ob polita vestimenta tua dare oportere." It is amusing to contrast the laconic brevity of this form with a modern declaration upon such a transaction, expanded upon the record.

After the declaration followed the defendant's plea, (*exceptio*), and upon that the plaintiff's *replication*, the defendant's rejoinder, (*duplicatio*), &c., until the matter in difference was reduced to a single question of law or fact. If the whole resolved itself into a question of law, then, as upon *demurrer*, it was decided by the prætor; but if the question ultimately depended upon a disputed fact, then came the joining of issue, the "*contestatio litis*," by which the litigants put them-

- *4] By the law of England, questions or issues of fact thus agreed upon are usually tried by the country, that is, by a
 *5] jury of twelve men, a part of the great body of the community.^o

selves to the proof of the fact by witnesses: "Festus ait, tum demum litigantes contestari litem dici, cum ordinato iudicio utraque pars diceret, 'Testes estote.'" —Hein. A. R. v. 2, 256. The issue was then sent to be tried by *Judices*, who in many respects bore a close resemblance to an English jury. "Si enim de jure disceptabatur, ipse prætor qui dicebat extra ordinem sin de facto iudex dabatur, unde formula si paret condemna." Conf. Seneca de Benef. III. 7. The judges were, like our jurors, private persons, selected for the trial of matters of fact upon the particular occasion. Their decision, however, was final; and instead of returning their verdict to the Court above, in order that final judgment might be pronounced, the jury themselves pronounced the sentence, according to the direction in the Formula, "*si paret condemna*."

The principal and characteristic circumstances in which the trial by a Roman differed from that of a modern jury, consisted in this, that in the former case, neither the prætor, nor any other officer distinct from the jury, presided over the trial, to determine as to the competency of witnesses, the admissibility of evidence, and to expound the law as connecting the facts with the allegations to be proved on the record; but in order to remedy the deficiency, they resorted to this expedient; the jury generally consisted of one or more lawyers, and thus they derived that knowledge of law from their own members which was necessary to enable them to reject inadmissible evidence, and to give a correct verdict as compounded both of law and fact. "Denique ut tanto minus esset periculi ne imperite judicarent solebant aliquando iis unus aut plures iudicii socii jurisperiti adjungi, quorum consilio omnia agerent." Gell. Noct. Att. XII., 13 Conf. Sigon. Hein. A. R. lib. 4, tit. 5, s. 3. Upon the trial, the plaintiff proved his declaration or replication, or the defendant his plea or rejoinder (*duplicatio*), accordingly as the pleadings threw the burthen of proving the affirmative on the one or the other. "Ubi ad iudicium ventum, actor suam actionem et replicationem, reus exceptionem et duplicationem probabat. Nam et reus excipiendo actor fiebat."—L. 1, D. de Excep. Hein. A. R. v. 2, 291.

^o Notwithstanding the difference of opinion which has prevailed among legal antiquaries as to the origin of the English jury, there seems to be great reason for supposing that it is derived from the *patria*, or body of suitors who decided causes in the county courts of our Saxon ancestors. That the trial *per juratam patriæ* of Glanville was derived from the trial *per patriam*, as used both before and after the Conquest, is rendered highly probable, not only by the very description of the trial *per patriam*, yet retained, but even still more strongly by the powers, qualifications and duties incident to the *jurata patriæ* of Hen. II. and Hen. III. This hypothesis seems to explain many singular incidents to the early trial *per juratam patriæ*, incidents which it would be difficult, if not impossible, to account for in any other manner. The *jurata patriæ*, like the *patria*, decided on their *own knowledge*: for this purpose they were selected from the *vicinage*; those (in the case of an assize) who had no knowledge of the facts were excluded to make room for such others as were supposed to know them; and although the concur-

*This justly celebrated institution is not more strongly recommended by its intrinsic excellence as a mode of [*6
 *attaining to "the truth, than by considerations of extrinsic [*7
 policy.

rence of twelve was essential to the verdict, yet as eleven might have been of a contrary opinion, a *majority* in effect decided: and in the case of a disputed deed, the witnesses were included among the jury, and their duty was, as it is still, in the language of our records, *Dicere veritatem*. Such incidents afford obvious reasons for supposing that juries were but selections from the *patria* or general assembly, who must have acted in the double capacity of witnesses and jurors.

Although this *jurata patriæ* differed from its original, the *patria*, both in respect of number and of the obligation of an oath, these were transitions which might not only easily be made, but which were likely to be made, and which we know actually were made, in the most ancient, perhaps, of all our courts, that is, the county court; where though, among the Saxons, and even after the Conquest, the verdict was given by the whole *comitatus*, and is still supposed to be the verdict of the suitors, yet it is in fact given by twelve jurors on oath. In the reign of Hen. II., Glanville speaks of the trial *per juratam patriæ* as a known and established institution. Whether the practice of occasionally delegating the duty of decision to a select portion of the body of suitors, and that sworn, was coeval with the popular tribunal itself, or subsequently introduced for the trial of civil rights, as we know it to have been for the purpose of criminal presentments, may be doubtful. It is probable, however, that the complete and final establishment of the jury system is attributable to many concurrent causes. In the first place, it is clear that an appeal from the *patria* to a select number was a practice of great antiquity; of this practice there is a very curious memorial in the *Monumenta Danica*, lib. 1, p. 72: "Erat universa ditio in certas paræcias sive curias divisa, hæ statim temporibus locisque per se quæque seorsim suis cum armis, patente sub Dio in campis conveniebant, aderantque ejusdem loci viri nobiles qui velut testes judicia assiderent. Ibi in medium prodibant qui contra alios litem se habere existimabant, auditisque et cognitis partis utriusque actionibus defensionibusque, conventus universus in concilium ibat, idque temporis spatium quod interim deliberando terrebatur, curam vocabant. Expensis diligenter et velitatis in partem utramque controversiis, in concessum redibant, vocatisque litigatoribus, de jure pronuntiabant. Si quis stare judicio non vellet, ad duodecim constitutos sive judices sive arbitros et ab his ad universæ conditionis conventum provocare ei licebat." The expression "sive judices sive arbitros" is singularly coincident with the doctrine in Bracton, f. 193, that the *jurata* was not liable to a conviction, as the assize was, for a false verdict, because the parties had made the *jurata* "*quasi judicem ex consensu*."

In the next place, there are evident traces of this practice in our own country; in illustration of which, the celebrated trial in the county court before Odo, bishop of Baieux, in the time of William the Conqueror, may be cited, where the verdict by the *patria* was required to be confirmed by the oaths of twelve selected for the purpose from the body of suitors. There are in fact many other vestiges of the (at least) occasional practice of delegating the task of decision to a select part;

- *8] *Secret and complicated transactions, such as are usually
 the subject of legal investigation, are too various in their
 *9] *circumstances to admit of decision by any systematic and
 formal rules; the only sure guide to truth, whether the object

twelve and its multiples appears to have been a favorite number for this purpose, not only among the Saxons, but other nations of antiquity.

Again, that the modern jury are the same with the *jurata patriæ* of Glanville and Bracton, their name, number, and general duty, which to this day is *dicere veritatem*, sufficiently prove, although it is clear that a very great change has taken place as to the manner of exercising their important functions. Even so lately as the reign of Hen. III. they exercised a kind of mixed duty, partly as witnesses, partly as judges of the effect of testimony; in the case of a disputed deed, the witnesses were enrolled amongst the jury, and the trial was *per patriam et per testes*; and to so great an extent was their character then of a testimonial nature, that it was doubted whether they were capable of deciding in the case of a crime secretly committed, and where the *patria* could have no actual knowledge of the fact. (Bracton, f. 173.) It was, however, at this period that the capacity of juries to exercise a far wider and more important function, in judging of the weight of testimony and circumstantial evidence, began to be appreciated, for about this time the trial by ordeal fell into disuse; and when this superstitious invention, the ancient refuge of ignorance, had been rejected as repugnant to the more enlightened notions of the age, it happily became a matter of necessity to substitute a rational mode of inquiry by the aid of reason and experience, for such inefficacious and unrighteous practices. From this æra probably may be dated the commencement of the important changes in the functions of the jury, which afterwards, though perhaps slowly, took place, until they were modelled into the present form.

The learned author of the Commentaries is inclined to derive the modern jury immediately from the Saxons, referring to the law of Ethelred, which provides that twelve men, *ætate superiores*, shall, with the *præpositus*, swear that they will condemn no innocent, absolve no guilty person. It is clear, however, that this constitution of thirteen men was merely in the nature of a *jurata delatoria*, or jury of accusation, not of trial, for the effect of a charge by the thirteen was merely to consign the accused to the *triplex ordalium*.—Others have asserted, that the origin of the present jury was the assize established in the reign of Henry II. It appears, however, very clearly from Glanville's Treatise, that the jury of twelve was of more ancient origin; for it is repeatedly spoken of in that work as a known and existing institution, and as the ordinary means of inquiry in the case of purprestures, nuisances, and trespasses which did not amount to disseisins. These were then tried *per juratam patriæ sive vicineti coram justiciariis*. Glan. l. 9, c. 11.

M. Meyer, in his truly valuable and interesting work (*Institutions Judiciaires*), is disposed to fix the origin of our juries at so late a date as that of Henry III. Inst. Jud. vol. 2, p. 165. But it is remarkable, that one reason which he strongly urges in support of this opinion, is the total silence of Glanville on this subject: "Dans cet ouvrage il ne se rencontre ni le nom de jury ni la chose même, quoiqu'il soit souvent question de l'assise," &c. Inst. Jud. vol. ii. p. 169. Glanville himself

be to explore the mysteries of nature, or unravel the hidden transactions of mankind, is reason aided by experience.

It is obvious, that the experience which would best enable those whose duty it is to decide on matters of fact, arising out of the concerns and dealings of society, to discharge that duty, must be that which results, and which can only result, from an intimate intercourse with society, and an actual knowledge of the habits and dealings of mankind: and that the reasoning faculties best adapted to apply such knowledge and experience to the best advantage in the investigation of a doubtful state of facts, are the natural powers of strong and vigorous minds, unencumbered and unfettered by the technical and artificial rules by which permanent tribunals would be apt to regulate their decisions.

Nor is the trial by jury less recommended by considerations of extrinsic policy. It constitutes the strongest security to the liberties of the people that human sagacity can devise; for, in effect, it confides the keeping and guardianship of their liberties to those whose interest it is to preserve them inviolate; and any temptation to misapply so great an authority for unworthy purposes, which might sway a permanent tribunal,^a can have no

affords the most decisive refutation of this argument. See l. 9, c. 11; l. 14, c. 3; see also l. 2, c. 6; l. 5, c. 4; l. 7, c. 16; and, consequently, the hypothesis of an origin later than the time when Glanville wrote, necessarily falls to the ground.

The trial by jury, though undoubtedly known and used in the king's courts in the reign of Henry II., had become much more frequent in the reign of Henry III., an æra from which its gradual change to its present form may be dated. It is not improbable, as far as regards the county court, that when its powers had been greatly abridged, the substitution of twelve jurors for the whole *comitatus* was adopted as a change of great convenience to the suitors of the court, as well as the litigant parties; the former would be more rarely called on to perform a burthensome duty, the latter would have their causes more patiently tried.

If it was ever the practice, either previous or subsequent to the Conquest, that the verdict by the *patria* or *comitatus* should be subject to an appeal to or confirmation by twelve of the *pares* on an oath, and of this, as has been seen, some traces are to be found, the transition to the select part would be perfectly easy; it would in effect be nothing more than the mere omission of a step in the process which had become useless and burthensome; experience having shown that justice was better done by a limited number, acting under the obligation of an oath, than by the precarious determination of a large and indefinite body, few of whom would possess any knowledge of the facts.

^a The power of deciding on matters of fact is much more capable of abuse, and liable to corrupt partiality, without appearing to be manifestly unjust, than the power of deciding on matters of law is. A judgment in law on ascertained facts must be justified by comparison with precedents; and it attracts public notice,

*10] influence *when entrusted to the mass of the people, to be exercised, by particular individuals but occasionally.

In addition to this, no institution could be better devised for securing, on the part of the people, a lively attachment to the constitution and laws, in the practical administration of which they act so important a part, in diffusing a knowledge of the laws themselves, and producing ready obedience to a system which they know to be justly and impartially administered.

For the finding of a verdict on every issue, it is essential, in the *first* place, to know what facts, when proved, will satisfy the issue in point of law; and, *secondly*, to inquire whether such facts have been proved. The office of the jury is confined altogether to the latter question; their duty is to ascertain the existence of facts by means of the judgment which they form of the credibility of witnesses, and by the inferences which they make from the circumstances submitted to their consideration. For the due discharge of this important function, they are supposed to be peculiarly well qualified by their experience of the conduct, affairs, and dealings of mankind, and the manners and customs of society. In this respect, and to this extent, the law confides implicitly in their knowledge, experience, and discretion. It interferes no further than by laying down cautionary rules to prevent the jury from being deceived or misled. Having done this, the rest is left to the conscience and discretion of the jury. And the Courts

*will only interfere with their decision where the verdict *11] has been perverse or clearly contrary to the evidence.

It is with a view to those objects that the rules of evidence are almost exclusively framed. But, in the next place, a knowledge whether particular facts, if established to the conviction of the jury, will satisfy the issue, or the allegations to be proved, is also essential to a verdict; and this is usually a question of law, and therefore within the province of the Judge. In such cases, therefore, it is for the Court to instruct the jury in point of law, to inform them what facts are essential to the proof of the issue, and that they ought to give their verdict in the affirmative or negative, according

because in its turn it becomes a precedent for future decisions. It is therefore the subject of public attention, and any material departure from ordinary principles would necessarily be remarked; but the testimony and evidence offered in proof of facts in particular instances, are capable of such infinite complexity and variety, that they admit of no certain standard for judging, and consequently a corrupt or erroneous decision is the less easy to be detected.

to the opinion of the jury that the particular facts are proved or disproved.

The jury, in finding a general verdict, are bound to find it according to the just application of the law as they receive it from the Court, and their own judgment whether the facts are proved or not; and every such verdict is presumed to be founded upon the law so expounded, and the facts so found.

If the jury, in a civil proceeding, misapply the law, the party injured may obtain redress by moving for a new trial. But the jury are not in any case, whether civil or criminal, bound to apply the law; they are always at liberty to find a special verdict, that is, to state specially what facts they find to be proved; and the remainder of that process which is essential to the verdict, that is, the application of the law to the facts so found, is left to be executed by the Court. In finding a special verdict, the jury discharge the whole of their office, for a special verdict does not contain merely a detail of the evidence given by the witnesses, but is conclusive as to the existence of all the ultimate specific facts of the case, which are essential to its determination, founded upon an examination of the credit due to the witnesses, and upon presumptions and inferences derived from all the circumstances of the case as detailed in evidence.

*That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such [*12 facts, as contradistinguished from all comment and argument on the subject, fall within the description of *evidence*.

Where such evidence is sufficient to produce a conviction of the truth of the fact to be established, it amounts to proof.

The origin, nature and quality of such evidence, the principles and rules which regulate its admissibility and effect, and its application to the purposes of proof, form the subject of the present Treatise.

The brief outline which has been given to show the relation which this branch of the law bears to the whole system, is sufficient to manifest its great importance.

There is, perhaps, no greater blessing incident to a highly improved state of civilization, than the substitution of a rational and satisfactory mode of judicial proof, for the rude, barbarous, and even impious practices resorted to in the dark and unlettered ages. Without certain modes of investigating truth, in cases where its light is ever liable to be obscured by fraudulent

practices exercised for the evasion of justice, the wisest laws are but vain and ineffectual: they may embellish the statute-book, as beautiful in theory, but in other respects they are a dead letter: frequently even worse; for where offenders cannot be detected and punished, the laws may do mischief in holding out a show of protection, which being but delusive, tends to induce a false and dangerous sense of security: what is still worse, whilst the criminal escapes, they may stamp the innocent with infamy, and crush them with judgments designed only for the guilty; and under an arbitrary constitution, may be converted into a dangerous instrument in the hands of power, for the destruction of those whose possessions are tempting, or principles obnoxious.

*13] In order to appreciate the advantages which result from *modes of investigation founded on just and rational principles, we have only to recollect the absurd, monstrous, and impious practices resorted to by our own ancestors, in common with other nations of antiquity. It was for the want of them that judicial oaths were multiplied to an extent of itself sufficient to bring the obligation into contempt: it was vainly hoped that the rank and number of compurgators, who swore not to any fact, but to mere belief, would compensate for their want of knowledge. Hence the superstitious appeals to the Deity by the trial by ordeal, and the ferocious and impious practice of the trial by duel. They did not venture to rely on the simple oaths of individual witnesses to facts, although with a flagrant degree of inconsistency they gave credit to the cumulative oaths of those who knew nothing of the facts: whilst they were either too ignorant or too indolent to try the credit of witnesses by diligent examination and comparison of testimony and facts, judicial oaths were multiplied to an absurd and profligate extent. Hence also the rude limits of prescription, which were established for the purpose of avoiding the necessity for inquiry.* It may, however, be recollected to their credit, that the shocking expedient of applying torture to extort confession, a practice sanctioned by many, even Christian legislators, was never resorted to by the Anglo-Saxons.

But however absurd, objectionable and mischievous such practices must appear at the present day, the progress of improvement has been slow; for though the trial by duel in civil suits received

* If a man wounded his slave, he was not to be presumed to be guilty of the murder, unless the slave died the day after.

a considerable check in the reign of Henry II., in consequence of the introduction of the trial by the grand assize, yet the practice was continued in appeals till long afterwards, and has but lately ceased to be the law; and though the trial by ordeal seems to have fallen into disuse ever since the early part of the reign of *Henry III. without any formal abolition, the doctrine of [*14 compurgation by wager of law is but recently abolished. It was not until long after the establishment of the jury trial that the investigation was conducted by the open examination of witnesses, and that the functions of jurors and witnesses were distinguished and separated; it was not until the reign of Queen Anne that witnesses for prisoners tried for felony were examined upon oath.

It is not, however, part of the present design to enter into any historical detail of the law on this interesting subject, further than as reference to the ancient law may be occasionally connected with its present details.

The subject may be conveniently considered, in relation,

First. To the elementary principles on which the legal doctrine rests.

Secondly. To the instruments of evidence, as governed by these principles and elementary rules.

Thirdly. To their application to the purposes of proof, either generally or particularly.

PART I.

GENERAL PRINCIPLES OF THE LAW OF EVIDENCE.

CHAPTER I.

NATURAL PRINCIPLES OF EVIDENCE.

FIRST, then, as to the general principles on which the law of evidence is founded.

The means which the law employs for investigating the truth of a past transaction are those which are resorted to by mankind for similar, but extrajudicial purposes. These are the best, usually the only means of inquiry, and it is for this reason that a jury of the country forms a tribunal so well qualified to judge of mere matters of fact; for, subject to certain exceptions, they decide by the aid of experience and reason, as they would do on any extrajudicial occasion. With these general principles the law can interfere in two ways only; either by excluding or restraining mere natural evidence by the application of artificial tests of truth, or annexing an artificial effect to evidence beyond that which it would otherwise possess. Hence it is that the great principles of evidence may be reduced to three classes, comprising,

1st. The principles of evidence which depend on ordinary experience and natural reason, independently of any artificial rules of law;

2ndly. The artificial principles of law, which operate to the partial exclusion of natural evidence by prescribing tests of admissibility, and which may properly be called the excluding principles of law;

*16] *3rdly. The principles of law which either create artificial modes of evidence, or annex an artificial effect to mere natural evidence.

In the first place, it rarely happens that a jury, or other tribunal,^a whose business it is to decide on a matter of fact, can do so by means of their own actual observation. It is obvious, that when inquiry is to be made into the circumstances of a past transaction before a jury, information must be derived for the most part from the same source, and must be judged of and estimated, to a great extent, by the same rules that would be resorted to and applied by any individual whose business or whose interest it was, in the ordinary course of human events, to institute such an inquiry.

What, then, are the means to which a person interested in such an inquiry into a past transaction would naturally resort? He would, in the first place, ascertain what witnesses were present at the transaction, and would obtain all the information which they could supply. If none were present, or none could be found from whom he could obtain immediate intelligence, he would procure information from others, who, although they had not actual personal knowledge of the fact, had yet derived information on the subject, either directly or mediately, from others who possessed or had acquired and communicated such their knowledge, either orally or in writing.

Again, in the absence of other information on the subject, he would endeavour carefully to ascertain the circumstances which accompanied the transaction, and had such a connexion with it as enabled him to draw his own conclusions on the subject of inquiry.

In short, where knowledge cannot be acquired by means of actual and personal observation, there are but two *modes by which the existence of a by-gone fact can be ascertained: [^{*17}

1st. By information derived either immediately or mediately from those who had actual knowledge of the fact: or,

2ndly. By means of inferences or conclusions drawn from other facts connected with the principal fact which can be sufficiently established.

In the first case, the inference is founded on a principle of faith in human veracity sanctioned by experience. In the second, the conclusion is one derived by the aids of experience and reason from the connexion between the facts which are known and that

^a To a limited extent, a jury or Court, in deciding matter of fact, may have actual personal knowledge. Thus a jury may have a view of lands, &c., the subject of litigation: Judges may decide by inspection of a record, or of the person in cases of disputed infancy. So also of a jury of matrons in case of alleged pregnancy, &c.

which is unknown. In each case the inference is made by virtue of previous experience of the connexion between the known and the disputed facts, although the grounds of such inference in the two cases materially differ.

All evidence thus derived, whether immediately or mediately, from such as have had, or are supposed to have had, actual knowledge of the fact, may not improperly be termed *direct* evidence; whilst that which is derived merely from collateral circumstances may be termed *indirect* or *inferential* evidence.

It is obvious that the *means* of indirect proof must usually be supplied by direct proof; for no inference can be drawn from any collateral facts until those facts have themselves been first satisfactorily established, either by actual observation, or information derived from others who have derived their knowledge from such observation.

*18]

*CHAPTER II.

EXCLUDING PRINCIPLES.

SUCH, then, being the ordinary sources of evidence, what are the *excluding* principles which restrain the admission of evidence? As juries must decide by the aid of the same general principles of belief on which any individual would act who was desirous of satisfying himself by inquiry as to the truth of any particular fact, and as an individual inquirer would not think it necessary to limit himself by any particular rules, why should the evidence to be submitted to a jury be limited or affected by any technical rules?

The answer is, that the law interferes for two purposes: first, in order to provide more certain tests of truth than can be provided, or indeed than are necessary, in the ordinary course of affairs, and thereby to exclude all weaker evidence to which such tests are inapplicable, and which, if generally admitted, would be more likely to mislead than to answer the purposes of truth; and in the next place, to annex an artificial effect to particular evidence which would not otherwise belong to it, on grounds of general policy and convenience.

The great principle on which the law proceeds in laying down rules of an exclusive operation is, not to alter the value and effect

of evidence in the investigation of truth; that would be absurd, especially where the tribunal invested with the power of decision consists of jurors selected from the great body of the people, who, being unskilled in technical rules and unaccustomed to judicial habits, must necessarily decide by the aid of their own experience of things and natural power of their reason, by principles on which they would act in the affairs of ordinary life: on the contrary, one great object of the law is to aid *the natural powers of decision, by adding to the weight and cogency of the evidence [*19 on which a jury is to act. Another great object is, to prevent the reception of evidence which in its general operation would injure the cause of truth, by its tendency to distract the attention of a jury, or even to mislead them.¹

The necessity for resorting to superior tests of truth, the effect

^a As a consequence of these objects, the application of these excluding principles is entirely for the judge, who ought to decide on any question of fact which their application may involve. If the proof is by witnesses he must weigh their credibility, and if counter evidence be offered he must receive and decide upon it; and he has no right to ask the opinion of the jury upon any such question, it being one purely preliminary to the reception of the evidence; even though ultimately the same fact is to be submitted to the jury for their opinion; *Doe dem. Jenkins v. Davies*, 10 Q. B. 314.

¹ Thus it has been decided in many cases that the competency of a witness, though it may depend upon a question of fact, is the province of the court exclusively; *Cook v. Mix*, 11 Conn. 432; *Amory v. Fellows*, 5 Mass. 219; *Tucker v. Welsh*, 17 Ibid. 160; *Reynolds v. Lounsbury*, 6 Hill, 534. When an objection is made, at a trial, to the competency of a witness on the ground of interest, the decision of the judge on the question of fact is conclusive; *Dole v. Thurlow*, 12 Metcalf, 157. So, if made before a referee, his decision is not the subject of revision; *Leach v. Kelsey*, 7 Barbour S. C. Rep. 466.

In *Hart v. Heilner*, 3 Rawle, 410, a different principle was declared. It was there said that if a person be called as a witness, and objected to by the adverse party on the score of interest, the party making the objection must show the existence of the interest, and if it should *clearly* appear to be so from the testimony adduced for the purpose of proving it, the court will decide upon it and reject the witness; but if it be *in the least degree doubtful*, the court will not decide the question of interest in the witness, but receive his testimony, and leave it to the jury to determine, and, if they should be of opinion that he has such an interest, then instruct them to pay no regard whatever to his testimony, and leave it altogether out of view. According to this case, it would be discretionary with the court either to decide the question of fact directly, or to submit it to the jury. But in *Chouteau v. Searcy*, 8 Missouri, 733, it was expressly held to be error, after admitting the testimony of a witness, to instruct the jury to disregard such testimony, if they should find that the witness was interested.

of which is to exclude evidence not warranted by those tests, is founded on the apprehension that the evidence on which an individual in the ordinary transactions of life might safely rely, could not, without the additional sanction of such tests, be safely relied upon, or even admitted, in judicial investigations. For, in the first place, in the ordinary business of life neither so many temptations occur, nor are so many opportunities afforded for practising deceit, as in the course of judicial investigations, where property, reputation, liberty, even life itself, are so frequently at stake: in the common business of life each individual uses his own discretion with whom he shall deal and to whom he shall trust; he has not only the sanction of general reputation and character for the confidence which he reposes, but slight circumstances, and even vague reports, are sufficient to awaken his suspicion and distrust, and place him on his guard; and where doubt has been excited, he may suspend his judgment till by extended and repeated inquiries doubt is removed. In judicial inquiries it is far otherwise; the character of a witness cannot easily be subjected to minute investigation;

*20] *the nature of the proceeding usually excludes the benefit which might result from an extended and protracted inquiry, and a jury are under the necessity of forming their conclusions on a very limited and imperfect knowledge of the real characters of the witnesses on whose testimony they are called on to decide.

It has been truly observed, that there is a general tendency among mankind to speak the truth, for it is easier to state the truth than to invent; the former requires simply an exertion of the memory, whilst to give to false assertions the semblance of truth is a work of difficulty. It is equally apparent that the suspicion of mankind would usually depend on their ordinary experience of human veracity; if truth were always spoken no one would ever suspect another of falsity, but if he were frequently deceived he would frequently suspect. Hence it is that jurors, sitting in judgment, would usually be inclined to repose a higher degree of confidence in ordinary testimony than would justly be due to it in the absence of peculiar guards against deceit: for as the temptations to deceive by false evidence in judicial inquiries are far greater than those which occur in the course of the ordinary transactions of life, they would be apt to place the same reliance on the testimony offered to them as jurors, to which they would have trusted in ordinary cases, and would consequently, in many instances, overvalue such evidence.

The law therefore wisely requires that the evidence should be of the purest and most satisfactory kind which the circumstances admit of, and that it should be warranted by the most weighty and solemn sanctions. This indeed is but a consequence of one great and important rule of law, viz., that the best evidence shall be adduced; the effect of which is, as will afterwards be seen, to exclude inferior evidence, whenever it is offered in place of that which is of a superior degree and more convincing nature.

Again, for the purposes of saving both time and expense, *and to prevent the minds of juries from being distracted from that which is material, it is indispensably necessary to [*21 place bounds to collateral evidence, and to exclude such as is of too weak and suspicious a nature to deserve credit, and which, though it possessed no tendency to mislead, would still be mischievous in occasioning delay and expense, and attracting fruitless attention.

In order to exhibit clearly the nature and extent of the excluding tests recognised by the law of England, it is essential first to consider the different classes of evidence to which such tests apply; and then to consider what tests are applicable to each of such classes.

For this purpose all evidence may be divided into two classes: 1st. *Direct*, which consists in the testimony, whether *immediately* or *mediately*, derived from those who had actual knowledge of the principal or disputed fact; or 2ndly, *indirect* or inferential evidence, where an inference is made as to the truth of the disputed fact, not by means of the actual knowledge which any witness had of the fact, but from collateral facts ascertained by competent means.

Direct or testimonial evidence, again, is either *immediate*, that is, where a witness states his own actual knowledge of the fact, or *mediate*, where the information is communicated, not immediately by the party who had actual knowledge of the fact, but from him through the intermediate testimony of one or more other witnesses.

First, then, what are the principles which govern the reception of immediate testimony?

To render the communication of facts perfect, the witness must be both *able* and *willing* to speak or to write the truth. It is necessary that he should have had, in the first place, the means and opportunity of acquiring a knowledge of the facts; and, in the second, that he should possess the power and inclination to

transmit them faithfully; consequently, the first great object of the law is to secure, by proper means, the inclination of the witness to *declare the truth, and to ascertain his ability to *22] do so by adequate tests; and it is for the jury afterwards to judge of the credit due to the witnesses, considering their numbers, their opportunities for observing the facts, the attention which they paid, their faculties for recollecting and transmitting them, their motives, their situation with respect to the parties, their demeanor, and their consistency.

In order to exclude impure or suspicious testimony, and to add the most solemn and binding sanction to that which is admitted, the law, in the first place, excludes all testimony which is not given under the sanction of an *oath* or its equivalent: and in the next place, subjects the witness to *cross-examination* by the party against whom the evidence is offered.

A consequence of the first of these tests until recently was, that the testimony of a person who by the turpitude of his conduct had made it probable that he would not regard the obligation of an oath was not received, and therefore no individual who had been convicted of any *infamous crime* was competent to give evidence in a court of justice. The legislature has, however, thought it wiser to admit the evidence of such a person, and to leave it to the discrimination of the jury to attach a proper weight to it, and a recent statute^b has enacted that no person offered as a witness shall be excluded from giving evidence by reason of incapacity from crime.¹

^b 6 & 7 Vict. c. 85.

¹ The rule which excludes a witness on the score of infamy still subsists in most if not all the United States.

The conviction of an infamous crime in another State, or in a foreign country, does not, however, render one incompetent to testify as a witness, though it has been held that the record is admissible to affect his credibility; *Comm'th v. Green*, 17 Mass. 515; *Comm'th v. Knapp*, 9 Pick. 496; *Chase v. Blodgett*, 10 N. Hamp. 22; *Uhl v. The Comm'th*, 6 Grattan, 706; contra, *The State v. Candler*, 3 Hawks, 393.

It is the nature of the crime, not the punishment, which determines whether a convict is an admissible witness. Thus, treason, felony, or any species of the *crimen falsi*, are clearly included; *People v. Whipple*, 9 Cowen, 707. Fine, imprisonment, or transportation for an offence not infamous, does not render a witness incompetent on the ground of infamy; *U. States v. Bockius*, 3 Wash. C. C. 99; *Clarke v. Hall*, 2 Har. & McH. 375. An attempt to procure the absence of a witness for a criminal prosecution is not, it seems, an "infamous"

Another consequence of these tests was that the law would not receive the evidence of any person, even under the sanction of an oath, who had an interest in giving the proposed evidence, and whose interest therefore conflicted with his duty.

This rule of exclusion, considered in its principle, was founded on the known infirmities of human nature, which was deemed too weak to be generally restrained by *religious or moral obligations, when tempted and solicited in a contrary direction by temporal interests. Though there were, do doubt, many whom no interested motive could seduce from a sense of duty, and by their exclusion this rule operated, in particular cases, to shut out the truth; yet as the law must prescribe general rules, and it was thought probable that more mischief would result from the general reception of interested witnesses than was occasioned by their general exclusion, the evidence of interested persons was inadmissible.

The necessity for defining and limiting the extent of the operation of this principle was an immediate consequence of its adoption, for the sake of certainty in its application, and also to prevent its operating too largely to the exclusion of evidence, which would have been productive of great inconvenience. Hence the law defined the kind of interest which should exclude, and limited it to a *legal interest* in the event, as contradistinguished from affection, prejudice or bias.¹ Here the law drew the line of distinction,

offence; *State v. Keyes*, 8 Vermont, 57. So a conviction under an act against cutting timber; *Koller v. Firth*, 2 Penn. 723. So of keeping a bawdy house; *Deer v. The State*, 14 Missouri, 348. A person convicted of the offence of receiving stolen goods, knowing them to have been stolen, is not a competent witness; *Comm'th v. Rogers*, 7 Metcalfe, 500.

A conviction, however, of an infamous crime is not enough. There must be judgment on the verdict, and the judgment must be proved; *People v. Whipple*, 9 Cowen, 707; *U. States v. Dickinson*, 2 McLean, 325; *Skinner v. Perot*, 1 Ashmead, 57; *State v. Valentine*, 7 Iredell, 225.

¹ The general rule is, that if a witness cannot gain or lose by the event of a suit, or if a verdict cannot be given in evidence for or against him in another action, the objection goes to his credit, and not to his competency; *Van Nuys v. Terhune*, 3 Johns. Cas. 82. An interest in the question only does not disqualify a witness, but the objection goes to his credit only; *Id.*; *Evans v. Eaton*, 7 Wheat. 356; *Spurr v. Pearson*, 1 Mason, 104; *Willing v. Consequa*, 1 Peters C. C. Rep. 301; *Drake v. Maxwell*, 5 Halsted, 297; *Wakely v. Hart*, 6 Binn. 319; *Cornegy v. Abraham*, 1 Yeates, 34; *Hayes v. Grier*, 4 Binn. 83. Where A. B. and others entered into a contract with X., and A. afterwards brought an

which must be drawn somewhere, and which would have excluded too much of the means of discovering the truth, had it incapacitated every witness who, from kindred, friendship, or any other strong motive by which human nature is usually influenced, might have been suspected of partiality. Hence, although a man and his wife could not give evidence for each other,^c (for their interests are in law identical,) yet no other degree of relationship or connection in society, whether natural or artificial, incapacitated the parties from giving evidence for each other. A father was a competent witness for his son,^d and a son for his father; the guardian and his *24] *ward, the master and his servant, might mutually give evidence for each other.^e

What constituted such a *legal interest* may be stated generally to have been either a *direct and certain* interest in the event of the cause, or an interest *in the record* for the purposes of evidence, however minute that interest may have been. It is obvious that a rule so wide and extensive in its terms must have given rise to constant questions and doubt, and as a general principle in the practical application of it, as on the one hand the rejection was peremptory and absolute, but on the other if the witness was received, it was still for the jury to consider what credit was due to his testimony, taking into consideration all the circumstances of the case, and the motives by which he may have been influenced, it was thought safer to admit the evidence where there was a doubt than to exclude it altogether. Hence it was the inclination of the courts that objections of this nature should go to the *credit* of the witness rather than his competency. In order to meet the objection, various expedients, by means of releases, &c., were generally resorted to, and the practical inconveniences of so extensive an exclusion being found intolerable, the legislature interposed and

^c Nor against each other, as will be seen, on grounds of policy.

^d The application of the principle by the civil law was much more strict, and mutually excluded father and son, patron and client, guardian and ward, from giving evidence for each other; a servant or other dependent was also incompetent to give evidence for his master, and the testimony of a friend or enemy was regarded with great jealousy. Pand. lib. 22, tit. 5, s. 140.

^e For the application of this rule, see tit. INTEREST.

action against X. for a violation of his rights under that contract, it was held that B. was a competent witness for A., being only interested in the question; *Wadhams v. The Litchfield and Canaan Turnpike Co.*, 10 Conn. R. 416. G.

put an end to the latter branch of the rule by providing that if any witness should be objected to on the ground that the verdict or judgment would be admissible in evidence for or against him, he should nevertheless be examined, but a verdict or judgment in the action in favour of the party in whose behalf he should have been examined should not be admissible for him, nor should a verdict or judgment against such party be admissible in evidence against him. The effect of this measure having *been found beneficial upon the suggestion of Lord *Denman*, the legislature again [*25 interfered,^g and limited the operation of the former branch of the rule by enacting that, except in certain instances which presently will be mentioned, no person offered as a witness should be excluded by reason of interest from giving evidence, but that every person so offered should be admitted to give evidence on oath or affirmation, notwithstanding that such person might have an interest in the matter in question or in the event of the trial, suit or proceeding in which he should be offered as a witness.

The interest, however, of a person who was either actually or substantially a party to the suit was still thought to present a sufficient objection to the admission of his evidence. By way of qualification or proviso, therefore, upon the former general enactment, it was declared that the act should not render competent any party to the suit, action, or proceeding individually named in the record,—or any lessor of the plaintiff, or tenant of the premises sought to be recovered in ejectment,—or the landlord or other person in whose right any defendant in replevin made cognizance,—or any person in whose immediate and individual behalf any action was brought or defended either wholly or in part,—or the husband or wife of such persons respectively.

With respect to the rule of evidence thus established, it was objected that the law excluded witnesses falling within any of these predicaments, though their interest in many cases was of the smallest pecuniary amount, yet, in others, admitted the testimony of persons who lay under the influence of the strongest ties of affection or large pecuniary interests in the result, and hence had a far greater temptation to deceive. In answer, it was said that

^g 6 & 7 Vict. c. 85.

^f 3 & 4 Will. IV. c. 42, s. 26. The statute likewise provided (s. 27), in order to facilitate proof of the facts (see *Rees v. Walters*, 2 M. & W. 529), that the name of the witness and of the party on whose behalf he was examined should be indorsed on the record.

this observation, though true, afforded no fair ground of objection. The simple question was, whether any exclusive rule was necessary. Assuming that the law properly recognized any such test, and that the exclusion of a *witness on the ground of interest *26] was in some cases requisite, a general rule must be laid down, and the law must exclude all persons falling within it. To exclude all who had any interest whatever had been found by experience to be impolitic and unwise; to admit all who had an interest was considered to be unsafe. The line must be drawn somewhere. To adopt a standard of pecuniary amount, where the value of the subject-matter in dispute was often the very point to be ascertained by the verdict, and where in all cases the resulting incident of costs must necessarily be extremely uncertain, would be impracticable. Such a standard, too, would be irrational, unless the pecuniary circumstances as well as the moral principles of the persons to whom it was applied were the same. The sum, for example, which might offer an irresistible temptation to a poor or immoral man to commit perjury, would in nowise influence a wealthy or conscientious person. In truth, the infinite variety of human circumstances rendered any test which should be wholly free from objection on the score of inequality utterly impracticable. The only course was, if interest were to form a barrier, to select that class who in the vast majority of instances had so strong a motive operating upon them as to create great risk that they might be induced to commit the demoralizing crime of perjury, and who would most probably present evidence on which it would be unsafe to proceed.

To the rule of exclusion however, as it existed before the passing of the statutes just mentioned, there were two exceptions. The first was where the witness had previously, and with a view to deprive a party of the benefit of his testimony, or even wilfully and wantonly, acquired an interest in the event; for this was to be considered as a species of fraud upon the individual or the public, who had an interest in his testimony. 2ndly. The law admitted the testimony of an interested witness, on the ground of the *necessity* of the case, where, in the common course of human *27] affairs, if the witness were to be considered as *incompetent, a failure of justice would result from defect of testimony.¹

¹ In general, the interest, to exclude a witness, must not have arisen after the fact to which he is called to testify happened, by his own act and without the

These exceptions, however, were rare, and confined principally to the cases of a servant who transacted his master's business, and who, in the usual course of affairs, was the only person who could give evidence for his master: of a wife on a charge against the husband of having committed a violence to her person; and of one who brought an action against the hundred under the statute to recover the value of the property of which he had been

interference or consent of the party calling him; *Jackson v. Rumsey*, 3 Johns. R. 237; *Turney v. Knox*, 7 Monr. 91. An interest in the event of a suit, acquired after the commencement, does not render a witness incompetent, unless that interest was acquired from the party offering him; *Rhem v. Jackson*, 2 Dev. 187. Yet if a witness offered by the plaintiff has become interested in the event of the suit, by a *bona fide* contract with the defendant, made in the regular course of business, and without any intention of the defendant or the witness to deprive the plaintiff of his testimony, he is incompetent, although such interest was created after the plaintiff had become entitled to his testimony; *Eastman v. Winship*, 14 Pick. 44. G.

Where the party objecting to a witness, on the ground of interest, which was acquired by a contract entered into subsequently to his knowledge of the facts he is brought to prove, is himself a party to the agreement creating the interest, or had any agency in causing it to be created, the witness may be admitted to testify, notwithstanding such interest; *Burgess v. Lane*, 3 Greenleaf, 165; *Manchester Iron Co. v. Sweeting*, 10 Wendell, 162. A witness cannot deprive a party of his evidence, by creating a subsequent interest by his own act, without the concurrence of the party calling him; much less can he do so by agreement with the opposite party; *Hafner v. Irwin*, 4 Iredell, 529; *Baylor v. Smithers*, 1 Litt. 105; *Long v. Bailie*, 4 Serg. & Rawle, 222; *McDaniel's Will*, 2 J. J. Marshall, 331; *Price v. Woods*, 7 Monroe, 223; *Clark v. Brown*, 1 Barb. 215. If, however, the subscribing witness to an instrument becomes interested and a party to the cause, even though he does so voluntarily, he cannot be examined as a witness; *Blackwelder v. Fisher*, 4 Dev. & Batt. 204.

Servants and agents, though interested, are, in general, admissible as witnesses from necessity; *Fisher v. Willard*, 13 Mass. 379; *Phillips v. Bridge*, 11 Ibid. 242; *Rice v. Grove*, 22 Pick. 158; *Fuller v. Wheelock*, 10 Ibid. 135; *Alexander v. Emerson*, 2 Litt. 25; *Phelps v. Sinclair*, 2 N. Hamp. 554; *Sewall v. Fitch*, 8 Cowen, 215; *Shepard v. Palmer*, 6 Conn. 95; *Livingston v. Swannick*, 2 Dall. 300; *U. S. Bank v. Stearns*, 15 Wend. 314; *Strafford Bank v. Cornell*, 1 N. Hamp. 193; *Bk. of Kentucky v. McWilliams*, 2 J. J. Marsh. 256; *Wainwright v. Straw*, 15 Verm. 215; *Stringfellow v. Marriott*, 1 Ala. 573; *Stathard v. Call*, 7 Missouri, 318; *Doe v. Himelick*, 4 Blackford, 494; *Gilpin v. Howell*, 5 Barr, 41; *Bean v. Pearsall*, 12 Alabama, 592; *The State v. Holloway*, 8 Blackford, 45.

The exception to this rule is where an action is brought against the principal or master to recover for the negligence or misfeasance of the servant or agent; *Railroad Co. v. Kidd*, 7 Dana, 245; *Newbold v. Wilkins*, 1 Harrington, 43; *Middlekauf v. Smith*, 1 Maryland, 329; *McClure v. Whitesides*, 2 Carter, 573.

robbed; for here, from the very nature of the case, it was highly improbable that he should be able to adduce any witness to prove the robbery.¹ It was not sufficient that the inability to procure evidence should result from the circumstances of a particular case, for that would have amounted to little short of the destruction of the general rule; the necessity must have arisen from a general presumption arising from the nature of the case, that in the common course of human affairs there would be a defect of evidence and a failure of justice, unless such evidence was admitted.

Acting upon the principle of these exceptions to a certain extent, and the great probability that in trifling transactions the parties themselves would be the only persons who could speak to them, and regarding also the limit of the interest which the restricted nature of their jurisdiction involved, the legislature, in establishing courts for the recovery of small debts, formerly provided in many instances that the parties themselves should be competent witnesses. When these tribunals came to be swept away by the provision for the establishment of the County Courts,^{*} the question of the exclusion of interested witnesses necessarily came under discussion, and *28] it was thought more beneficial, upon *the whole, to enact that before those tribunals the parties, their wives, and all other persons might be examined.

Hence immediately arose a great inconsistency. By far the greater proportion of the numerous demands recoverable in these were also recoverable in the Superior Courts; in the former, the evidence of the party was to be weighed, in the latter it was to be deemed wholly unworthy of trust. It thus appeared as if the Superior Courts had less efficacious means of testing the truth of evidence and detecting falsehood than these inferior tribunals. The plaintiff, too, who had his option as to where he should sue, if his own testimony would be adverse, or he knew the evidence of the defendant could establish his defence, sued in the Superior Court and excluded the evidence, and no equivalent option was

¹ *Pinkney v. Inhabitants DeRotel*, 2 Wms. Saund. 374; 2 Roll. Abr. 685. So in cases of extortion by duress, 7 Mod. 119, 120; and in suing for penalties under 5 Anne, c. 1, s. 5; *R. v. Lockup*, 1 Ford, MSS. 542; Willes, 425, n.(c); the plaintiff, or party interested might be a witness. And see *Lock v. Hayton*, Fort. 246; also the instance of the deposition of the defendant in an action for a malicious prosecution made on the occasion of the charge; *Jackson v. Bull*, 2 M. & Rob. 176.

^{*} 9 & 10 Vict. c. 95, s. 83.

given to a defendant. The jurisdiction of these courts having been considerably enlarged and a far wider option being thus afforded to plaintiffs, and the matters of which they were enabled to take cognizance having become still more important, it was deemed unreasonable any longer to preserve a distinction between the practice of the different tribunals in these respects. Hence the legislature, in the last session of Parliament,¹ abrogated the whole of the exceptions contained in Lord *Denman's* Act, save that which related to the admissibility of the husbands and wives of the several persons mentioned in those exceptions, and enacted^m that the parties to any proceeding in any court, and the persons in whose behalf it might be brought or defended, should be competent and compellable to give evidence. Suits and proceedings, however, instituted in consequence of adultery, and actions for breach of promise of marriage, were thought to stand upon a peculiar footing, and therefore such proceedings were excepted.ⁿ¹

In criminal cases the examination of the person charged has ever been regarded in England with great aversion, more especially

¹ 14 & 15 Vict. c. 99, *post*, p. 140.

^m Sect. 2.

ⁿ Sect. 4.

¹ There are many cases in which interested persons are admitted at common law, even though they may be parties to the record. A large class of such cases is, where one party is admitted to prove by his own oath his book of original entries, to substantiate a charge against the other party for goods sold and delivered, or for work and labour done; but it does not subject to cross-examination generally as a witness in the cause; *Eastman v. Moulton*, 3 N. Hamp. 156; *Weed v. Bishop*, 7 Conn. 128; *Fredd v. Eves*, 4 Harrington, 385; *Webb v. Pindergrass*, *Ibid.* 439; *Robbins v. Merritt*, 31 Maine, 451.

Another class is, where a party is admitted to prove notice, or the loss of a paper, or death or absence of a subscribing witness, as preliminary to the introduction of secondary evidence, whenever such evidence is addressed to the judge merely; *Jordan v. Cooper*, 3 Serg. & Rawle, 564; *Douglass v. Sanderson*, 2 Dall. 116; *Chamberlain v. Gorham*, 20 Johns. 144; *Siltzell v. Michael*, 3 Watts & Serg. 329; *Juzan v. Toulmin*, 9 Alabama, 662; *Fitch v. Bogue*, 19 Conn. 285.

But when demand or notice is a substantive fact, necessary to make out the case, it must be proved, as other facts, by competent testimony; *Grant v. Leavan*, 4 Barr, 393.

So a party suing a common carrier for the loss of a trunk containing personal apparel, has been admitted to testify to the contents on the principle of necessity; *Herman v. Drinkwater*, 1 Greenleaf, 27; *County v. Leidy*, 10 Barr, 45; *Sparr v. Willman*, 11 Missouri, 230. Contra: *Snow v. Eastern R. R. Co.*, 12 Metcalf. 44.

But in such an action it was held that the plaintiff was incompetent to prove that there was money in the trunk, and how much; *David v. Moore*, 2 Watts & Serg. 230.

*29] as the examination of a person so charged *in his own behalf would involve his cross-examination for the prosecution; therefore adhering to the ancient practice, and retaining inviolate the principle that no man shall be bound to criminate himself, the statute also provided that it should not in criminal proceedings render any person charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself, or to render any person compellable to answer any question tending to criminate himself, or in any criminal proceeding render any husband or wife competent or compellable to give evidence for, or against each other.

The first great safeguard which the law provides for the ascertainment of the truth in *ordinary* cases, consists in requiring all evidence to be given under the sanction of an oath. This imposes the strongest obligation upon the conscience of the witness to declare the whole truth that human wisdom can devise; a wilful violation of the truth exposes him at once to temporal and to eternal punishment.

A judicial oath may be defined to be a solemn invocation of the vengeance of the Deity upon the witness, if he do not declare the whole truth, as far as he knows it.^o

Hence it follows that all persons may be *sworn* as witnesses who believe in the existence of God, in a future state of rewards and punishments, and in the obligation of an oath, that is who believe that Divine punishment will be the consequence of perjury;¹ and therefore Jews,^p Mahometans,^q Gentoos,^r or in short, persons of any

^o *Est autem Jusjurandum religiosa adseveratio per invocationem Dei tanquam vindicis si juratus sciens fefellerit.* Heinec. pars 3, s. 13. See Whewell, Elements of Morality, vol. i. p. 367; Tyler on Oaths.

^p Cowp. 389; 1 Raym. 282.

^q *Fachina v. Sabine*, Stra. 1104; *Morgan's case*, Leach, 52; 2 Hawk. c. 46, s. 152; *Omichund v. Barker*, 1 Atk. 21; 1 Wils. 84; *Rex v. Taylor*, Peake, 11.

^r *Ramkissensent v. Barker*, 1 Atk. 19; *Omichund v. Barker*, Willes, 538; 1 Smith, L. C. 195.

¹ There are some, though not, perhaps, very important differences, in the language of the decisions of various courts in the United States, on this subject. There is entire unanimity in holding that the witness must believe in the existence of God who will punish falsehood; but though some cases require that he should believe that there is a future state of retribution, others do not go to this extent. Of the former class are, *Wakefield v. Ross*, 5 Mason, 16; *Custiss v. Strong*, 4 Day, 51; *Atwood v. Kelton*, 7 Conn. 66. Of the latter class, *Butts v. Swartwood*, 2 Cow.

sect possessed of such belief,^a are so far competent *witnesses. Hence also it follows that children who are too young to [*30 comprehend the nature of an oath,^t and adults, who from mental infirmity or for want of instruction, do not understand this solemn obligation, or who do not believe in the existence of a Deity, or in a state where that Deity will punish perjury,^u cannot be admitted

^a 1 Wils. 84; *Reg v. Entrehman*, Car. & M. 248; and see note(y), *post*, Eng. C. L. R., 41.

^t *Vide supra*; and see East, P. C. 441, and *R. v. Powell*, Leach, C. C. L. 128, 237.

^u An atheist is not competent; B. N. P. 262; *Rex v. White*, Leach, C. C. L. 483; *Lee v. Lee*, 1 Atk. 43, 45; Co. Litt. 6; 2 Inst. 479; 3 Inst. 165; 4 Inst. 279; Fleta, b. 5, c. 22; Bract. 116. See *Rex v. Taylor*, Peake, Ca. Ni. Pri. 11, where Buller, J., held that the proper question to be asked of a witness is, whether he believes in God, the obligation of an oath, and in a future state of rewards and punishments: and, in *Reg v. Serva*, 2 Car. & K. 56, Eng. C. L. R., 61, on a witness stating that he was a Christian, Platt, B., refused to allow the witness to be asked any further questions before he was sworn.

431; *Noble v. People*, Breese, 29; *Cubbison v. McCreary*, 2 Watts. & Serg. 262; *Blocker v. Bumess*, 2 Alabama, 354; *Brock v. Milligan*, 10 Ohio, 121; *U. States v. Kennedy*, 3 McLean, 175; *Jones v. Harris*, 1 Strobbart, 160; *Bennett v. The State*, 1 Swan, 411.

In Virginia, no person is incapacitated from being a witness on account of his religious belief; *Perry's case*, 3 Grattan, 632.

It has been held that an adult of sound mind, when called as a witness, is not to be questioned as to his religious belief; *Jackson v. Gridley*, 18 Johns. 98.

Evidence of his declarations on the subject may be received *aliunde*; *Norton v. Ladd*, 4 N. Hamp. 444; *Beardsley v. Foot*, 2 Root, 399; *Scott v. Hooper*, 14 Verm. 535; *Arnold v. Arnold*, 13 Verm. 363; *Thurston v. Whitney*, 2 Cushing, 104.

But an honest change of opinion, after declarations of disbelief proved, may be shown by competent evidence; *Smith v. Coffin*, 6 Shepley, 157; *Comm'th v. Batchelder*, Thacher's Crim. Cas. 191.

But the witness himself cannot be heard in explanation or denial; *Smith v. Coffin*, 6 Shepley, 157; *The State v. Townsend*, 2 Harrington, 543; *Comm'th v. Wyman*, Thacher's Crim. Cas. 432.

Contra, that the witness may himself be examined; *Scott v. Hooper*, 14 Verm. 535. The defendant called a witness, to whom the plaintiff objected, on the ground of an alleged want of religious belief, and the judge admitted the testimony of witnesses in support of, and in opposition to, the objection; and afterwards the person objected to was examined on his *voir dire*, and having testified to his belief, was admitted to give evidence in chief: held that there was no error in this; *Quinn v. Crowell*, 4 Wharton, 334. This last case, however, was really decided on the ground that there is no bill of exceptions in the case of introductory evidence to the court, where the evidence in chief was properly admitted or excluded. "What boots it, then, that, even were the proper course otherwise,

as witnesses; since, in all these cases, either from want of understanding or want of belief, that obligation to speak the truth is wanting which the law has appointed on such occasions as an indispensable security.¹

As the object of the oath is to bind the conscience of the witness, it follows that some form of swearing must be used which the witness considers to be binding. On the principles of the common law, no particular form is essential to the oath; and therefore every witness is now^{*} sworn according to the form which he holds to be the most solemn, and which is sanctified by the usage of the

^{*} Cowp. 389; *Colt v. Dutton*, 2 Sid. 6; Ry. & M. 77; Eng. C. L. R. 21. By the stat. 1 & 2 Vict. c. 105, every person shall be bound by an oath, which shall have been administered in such form and with such ceremonies as he may declare to be binding, and is liable to be indicted thereon for perjury.

parol evidence of the witness's disqualification was heard before he himself was heard? The order of proof, even to a jury, is not the subject of error; and to examine him to his own competency would have assumed the fact in controversy, which it was determined, in *Griffith v. Reford*, (1 Rawle, 197,) cannot be done." Gibson, C. J.

¹ The capacity of a witness under fourteen years is to be determined by the court; *Comm'th v. Hutchinson*, 10 Mass. 225; *Anon.* 2 Penn. 930; *Van Pelt v. Van Pelt*, *Ibid.* 657.

A witness, over fourteen years of age, will not be interrogated respecting his capacity, unless some reason creating suspicion be shown; *Den v. Vanclerve*, 2 Southard, 589.

The evidence of a child of seven years of age, corroborated by circumstances, is sufficient to justify a conviction of a capital crime, although that evidence be contradicted by the evidence of an adult; the credibility of the witnesses being left to the jury; *State v. Leblanc*, Const. Rep. 354.

Idiots, lunatics, and madmen are not competent witnesses; *Livingston v. Hiersted*, 10 John. 362; *Evans v. Hettick*, 7 Wheat. 453; *Armstrong v. Timmons*, 3 Harrington, 342.

A witness, who is intoxicated, ought not to be sworn, or permitted to testify; *Hartford v. Palmer*, 16 Johns. 143; *Gould v. Crawford*, 2 Barr, 89.

It is no objection to a witness that he has been found an habitual drunkard, under the provisions of an Act of Assembly depriving such person of legal competency to act; *Gebhart v. Shindle*, 15 Serg. & R. 235.

A deaf and dumb person, capable of relating facts correctly by signs, may give evidence by signs through the medium of an interpreter, though it appear that such person can read and write, and communicate ideas imperfectly by writing; *The State v. De Wolf*, 8 Conn. 93; *Snyder v. Nations*, 5 Blackford, 295.

To exclude a witness from testifying as being *non compos*, or an idiot, the fact must be proved by other testimony, and not by a preliminary examination of the witness, and even if the court have any discretion, still it is not error for them to refuse to allow it; *Robinson v. Dana*, 16 Vermont, 474.

country or of the sect to which he belongs.⁷ A Jew is sworn upon the Pentateuch,⁸ and a Turk upon the *Koran;⁹ so it has been held that a Scotch covenant¹⁰ may be sworn according to the form of his sect, by holding up his hand without kissing the book. A Jew who has never formally renounced the religion of his ancestors, but considers himself to be a member of the established church, may be sworn on the Gospels.¹¹

The testimony must be sanctioned, not merely by an oath, but by a judicial oath, in the course of a regular proceeding, adminis-

⁷ It was formerly doubted whether the oath must not be taken on the Old or New Testament; 2 Hale, 279; but it was afterwards settled that it need not; 1 Atk. 21; 2 Eq. Ca. Abr. 397; 1 Wils. 84; Cowp. 390.

⁸ It was held that Jews might be sworn on the Pentateuch previous to their expulsion from England; *i. e.* before the 18 Edw. I., when they were first expelled from the kingdom; *Wells v. Williams*, 1 Ld. Raym. 282; Vern. 263; Cowp. 389. See Seld. tom. 2, fol. 1467, as to the form of swearing a Jew, *temp.* Edw. I.

⁹ *Fachina v. Sabine*, Stra. 1104; *Morgan's case*, Leach, C. C. L. 64.

¹⁰ *Per* Lord Mansfield, Cowp. 390; *Rex v. Mildrone*, Leach, C. C. L. 459; *Mee v. Read*, Peake, Ca. Ni. Pri., 23; *Rex v. Fitzpatrick*, Leach, 459; 2 Sid. 6, *Colt v. Dutton*. When Lord Hardwicke was desired to appoint a form for swearing the Gentoos, he said that it was improper, and that it must be taken according to the form which they held to be most solemn; *Ramkissensent v. Barker*, 1 Atk. 19.

¹¹ *R. v. Gilham*, 1 Esp. C. 285. A member of a religious sect which objects to the ceremony of kissing the book, may be sworn without it; *Mee v. Read*, Peake, C. 23; *Mildrone's case*, Leach, C. C. L. 459; *Colt v. Dutton*, 2 Sid. 6. A witness being of the Methodist persuasion, refusing to be sworn on the New Testament, was permitted to be sworn on the Old, stating he considered it binding on his conscience; *Edmonds v. Rowe*, Ry. & M. 77; Eng. C. L. R., 21; and see 1 & 2 Vict. c. 105, *supra*, note.(x)

¹ Swearing by the uplifted hand is recognized as a lawful oath, independent entirely of the provision of any statute allowing it; *Gill v. Caldwell*, Breese, 28; *Doss v. Birks*, 11 Humph. 431.

In Massachusetts, the liberty to affirm is confined strictly to Quakers; *U. States v. Coolidge*, 2 Gallis, 364.

A witness, who has no objection to being sworn, cannot be affirmed; *Williamson v. Carroll*, 1 Harrison, 217.

Oaths are to be administered to all persons according to their opinions, and as it most affects their consciences; *Gill v. Caldwell*, Breese, 28.

The manner of administering an oath or affirmation in a court of record, proceeding according to the course of the common law, is presumed to be correct and legal, unless it appear to be otherwise on the face of the record; *Coxe v. Field*, 1 Green, 215.

The oath of a Jew, complainant to an injunction bill, must be made according to the forms and solemnities of the Jewish religion; *Newman v. Newman*, 3 Halst. Ch. Rep. 26.

tered by an authorized person; for if the oath were extrajudicial, the witness could not be punished for committing perjury under that oath, and therefore one of the securities for truth which the law has provided would be wanting. Hence, although every other legal requisite may concur to render what a party has sworn admissible, and although the fullest opportunity has been afforded to the opposite party to cross-examine the witness, yet if the oath was extrajudicial, the testimony given under it is not admissible. A further objection to such evidence is, that the party against whom it was offered was not bound to notice it, and he ought not to be placed in a worse situation by omitting to make himself a
 *32] party to an extrajudicial *and illegal proceeding. This doctrine and the minor distinctions arising upon it, will be more fully discussed hereafter, when the different cases relating to the reception of judicial proceedings in evidence are considered; for the present, it may suffice to observe, that it is a general rule that testimony given under an oath merely extrajudicial, cannot afterwards be admitted in evidence, for the reasons already stated.

There are two exceptions to the general rule; the case of declarations made by a person under the apprehension of impending dissolution, and the exception introduced by the express provisions of the legislature in favour of the religious scruples of Quakers and some others. The principle upon which the first of these exceptions stands is very clear and obvious; it is presumed that a person who knows that his dissolution is fast approaching, that he stands on the verge of eternity, and that he is to be called to an immediate account for all that he has done amiss, before a Judge from whom no secrets are hid, will feel as strong a motive to declare the truth, and to abstain from deception, as any person who acts under the obligation of an oath.^d But so jealous is the law of any deviation from the general rule, that it confines the exception to the necessity of the case, and only renders such declarations admissible when they relate to the cause of death, and are tendered on a criminal charge respecting it.^e The exception in favour of Quakers, formerly confined to civil, has lately been extended to criminal proceedings, and similar provisions

^d This being the ground of the exception, it has been held that if the declarant was an infant too young to comprehend such a sanction, the declaration is not admissible; *Rex v. Pike*, 3 C. & P. 598; Eng. C. L. R., 14.

^e *R. v. Mead*, 2 B. & C., 605; Eng. C. L. R., 9.

have been made in favour of some other religious sects.¹ [*33
 *The rank or age of the party in no case forms an exception. A peer of the realm cannot give evidence without being sworn,^m and will incur a contempt of court if he refuses to be sworn.ⁿ It is now settled that the testimony of a child cannot be received except upon oath,^o although the contrary practice once prevailed.^p

Formerly, the general rule did not extend to the witnesses examined on behalf of prisoners charged upon an indictment^q with felony or treason;^r an exception which certainly was not founded in principle, and which was reprobated by Lord Coke.^s The statute 4 Jac. I. c. 1, directed, that upon the trial of offenders in the three northern counties, for offences committed in Scotland, the defendants' witnesses should be examined upon oath; and a like provision was made by the stat. 7 Will. III. c. 3, in all cases of treason which worked corruption of blood. The exception was finally and generally abolished by the *stat. 1 Anne, c. 9, s. 3, which directed that the witnesses for the prisoner should [*34
 be sworn in *all cases*.

The recent Bankruptcy Acts^t have also introduced another

¹ By the stat. 9 Geo. IV. c. 32, Quakers and Moravians are admitted to give evidence upon their solemn affirmation in all cases, criminal as well as civil. By the stat. 3 & 4 Will. IV. c. 49, their affirmation has the same force and effect as an oath in the usual form. By the stat. 3 & 4 Will. IV. c. 82, similar provisions are extended to Separatists; and, in consequence of the decision in *Doran's case*, 2 Mood. C. C. 37, by the stat. 1 & 2 Vict. c. 77, to persons who, having been Quakers or Moravians, have ceased to be such.

^m *Rex v. Lord Preston*, Salk. 278.

ⁿ *Ibid.* And it has been said that the same rule applies to the Sovereign himself; 2 Rol. Abr. 686; Hob. 213; but in the time of Car. I. the question was not allowed to be agitated; 1 Parl. Hist. 43. See 3 Wooddeson, 276; Com. Dig. Testmoigne, A.

^o *Rex v. Brasier*, Leach, C. C. L. 3rd ed. 237; *ib.* 128; and see the cases, *East*, P. C. 441; *Pike's case*, 3 C. & P. 598; Eng. C. L. R., 14; *R. v. Williams*, 7 C. & P. 320; and *post*, tit. INFANT.

^p The Court should hear the information of children not of discretion to be sworn without oath; 1 Hale, H. P. C., 634; 2 Hale, H. P. C. 279, 284. But Lord Hale adds, that such testimony is not sufficient of itself; 1 Hale, H. P. C. 634.

^q But the evidence for a defendant upon an appeal, or on an indictment or information for a misdemeanor, was always on oath; 1 Sid. 211, 325.

^r 2 Hale, 283; 2 Bulstr. 147; *Rex v. Throgmorton*, State Tr. 1 M.; Hawk. c. 36; *Rex v. College*, 3 Inst. 79; 4 State Tr. 178; Cro. Car. 292.

^s 3 Inst. 79. The practice was derived from the civil law; 4 Bl. Com. 352.

^t 8 & 9 Vict. c. 48, s. 1; 12 & 13 Vict. c. 106, ss. 117, 118.

exception, so far as the examination of the bankrupts and their wives before the Commissioners is concerned, by directing that on that inquiry they shall not be sworn, but make and sign a declaration that they will speak the truth, for a violation of which they may be indicted.

It will presently be seen under what circumstances evidence is admissible, though it want the sanction of an oath.

And next, the power given to the party against whom evidence is offered, of *cross-examining* the witness upon whose authority the evidence depends, constitutes a strong test both of the ability and of the willingness of the witness to declare the truth. By this means, the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are severally examined and scrutinized.

It is not intended in this place to enter into a detail of the numerous consequences which follow from the adoption of this test.^a It may be observed, generally, that it operates to the exclusion of all that is usually described as *res inter alios acta*; that is, to all declarations and acts of others which tend to conclude or affect the rights of a mere stranger.

Thus the depositions of witnesses before magistrates, under the statutes of Philip & Mary, and the late stat. 7 Geo. IV. c. 64, are not admissible against the accused, unless he has had an opportunity to cross-examine those witnesses.

*35] The voluntary affidavit of a stranger is not evidence *against one who had not the power to cross-examine him.* An answer in Chancery is not evidence against one who neither was a party to the suit, nor claims in privity with a party who had the opportunity.^y And, in general, the mere act, declaration or entry of a stranger, as to any particular fact, is not evidence against any other person,^z so as to conclude or affect him.

To satisfy this principle, it is not necessary that the party on whose authority the statement rests should be present at the time when his evidence is used, in order that he may then be cross-examined; it is sufficient if the party against whom it is offered has cross-examined, or has had the opportunity, having been legally

^a See tit. JUDGMENTS—DEPOSITIONS.

^x Bac. Abr. Ev. 627; Sty. 446; Bac. Abr. Ev. 628; and see *Rex v. Erith*, 8 East, 539; *Sir John Fenwick's case*, Obj. 4; 5 State Tr. 69.

^y Hardres, 315.

^z See Index, tit. RES INTER ALIOS.

called upon to do so when the statement was made. Hence it is that examinations or depositions taken in a cause or proceeding between the same parties are evidence, the witnesses or deponents being dead; for in such case, the party has had, or might have had, the benefit of a cross-examination. With respect to these classes of cases, it is worthy of notice, that if the party might have had the benefit of a cross-examination in the course of a judicial proceeding, it is the same thing as if he had actually availed himself of the opportunity. It is also to be observed, that if the examination or deposition was taken in the course of an extrajudicial proceeding, it will not afterwards be admissible in evidence, although the witness be since dead; because the party against whom the evidence is offered was under no obligation to pay any attention to it.^a

This test of truth not only excludes evidence of mere hearsay, for there the party on whose authority the statement rests cannot be cross-examined; but also decrees and judgments in private matters, in causes to which the party against whom they are offered was not privy, and consequently where he had not the opportunity to cross-examine the witnesses on whose testimony the judgment or decree was founded. For, as it would be dangerous to admit the testimony of a witness given upon a former occasion, where the party to the present cause had no opportunity to cross-examine him, it would be equally so to admit the judgment or decree which is founded upon that testimony; it would be indirectly giving full effect to evidence which is in itself inadmissible.¹

It is, however, to be observed, that there is one class of cases where decrees or judgments are evidence against a party, although he was not actually privy to the proceeding or suit in which the judgment or decree was pronounced. This happens where the suit

^a See tit. RES INTER ALIOS—JUDICIAL PROCEEDINGS, &c.

¹ It seems hardly necessary to note that the subject-matter of dispute must be the same in both cases; *Walker v. Walker*, 16 S. & R. 379; *Taylor v. Bank of Illinois*, 7 Monroe, 576. Where the subject-matter is the same, though the parties are not the same, it is enough that they are in privacy; *Cooper v. Smith*, 8 Watts, 536; *Merrill v. Bill*, 6 Smedes & Marshall, 730.

The question of boundary is a peculiar one. There a deposition may be read, though not regularly taken in a judicial proceeding, because it is a case in which even hearsay is admissible under certain restrictions; *Montgomery v. Dickey*, 2 Yeates, 212; *Bakert v. Day*, 3 Wash. C. C. 243.

Depositions cannot be read, unless taken in reference to an issue made up at the time they were taken; *Morrow v. Hatfield*, 6 Humph. 108.

or proceeding does not relate to a mere private transaction between individuals or particular parties, but to some more public subject-matter beyond the mere rights of the litigants, in which the public possess an interest. It will be necessary hereafter to consider these cases with some minuteness; for the present, it may suffice to advert to them generally, and briefly to state the principle on which such evidence is admissible; and how far it is inconsistent with the general and ordinary rule, that a party is not to be affected either by any testimony or judgment founded upon that testimony, where he has not had an opportunity to cross-examine the witness and to controvert his testimony. In many instances a court possesses a jurisdiction which enables it to pronounce on the nature and qualities of a particular subject-matter, where the proceeding is, as it is technically termed, *in rem*: as where the Ordinary or the Court Christian decides upon questions of marriage or bastardy; or the Court of Exchequer upon condemnations; or the Court of Admiralty upon questions of prize; or a Court of Quarter Sessions upon settlement cases. *Decisions of this nature, as will be

*37] seen,^b are for the most part binding and conclusive upon all the world. At present it is to be observed, in the first place, that this class of cases is scarcely to be considered as an exception to the general rule; because, in most instances, every one who can possibly be affected by the decision may, if he choose, be admitted to assert his rights to cross-examine and to controvert by evidence. But, secondly, if this class of cases is to be considered as forming an exception to the general rule, it is a necessary exception, since in such cases a final adjudication is absolutely essential to the interests of society, which require that the subject-matter should be settled and ascertained, and cannot bear that such questions should be left in a precarious, doubtful, and fluctuating state. For example: the Spiritual Court has an immediate and direct jurisdiction upon the validity of marriages; a jurisdiction which involves questions of the greatest importance to society in general—rights of property—questions of bastardy—and even criminal liabilities. It is therefore obviously essential to the existence of such a jurisdiction for useful and beneficial purposes, that its adjudication upon the subject-matter should be binding upon all; it would be in vain that a sentence of nullity of marriage should be pronounced in a Spiritual Court, if the marriage could still be considered in courts of law to exist as to all the legal rights and

^b See JUDGMENTS, &c., IN REM.

consequences of a valid marriage; and it would produce infinite inconvenience and confusion, if the same marriage could be considered as existing for some purposes, but not as to all; not to mention the great evil of permitting interminable litigation on the same question, which would be left open to dispute as often as the fluctuation of times and of circumstances introduced new interests, and brought fresh litigants into the field.

*There is another exception to the general rule, in the case where a declaration made by a person *in extremis*, and [*38 under the apprehension of approaching dissolution, is received in evidence; for such declarations are admitted to be proved, although the party against whom they are offered was not present, and therefore had not an opportunity to cross-examine and elicit the whole of the truth. But as this is an exception to a rule which is in general to be considered as absolutely essential to the ascertainment of truth, it is to be received with the greatest caution, and is never admitted, unless the court be first satisfied that the party who made the declaration was under the impression of approaching death, and unless it relate to the cause of his death and be tendered on a criminal charge respecting it. It has indeed been said, that the depositions of witnesses taken *in the absence of the prisoner* before justices of the peace, and before coroners, by virtue of the statutes 1 & 2 Philip & Mary, c. 10; 2 & 3 Philip & Mary, c. 13; and 7 Geo. IV., c. 64; were admissible in evidence against the prisoner after the death of the deponent; but it is now settled that such depositions before justices are not admissible, unless the prisoner was present, and had the benefit of cross-examination;^c and depositions taken by coroners, under the same statutes, seem to stand upon the same foundation. The subject will afterwards be more fully considered in its proper place; it must be recollected that at present the object is to consider the general operation of this principal test of truth established by the law. How far reputation and tradition are to be looked upon as exceptions to this general rule will presently be considered.^d

*Thus far as to the testimony of witnesses to facts, within their own actual knowledge, under the obligation of an oath, [*39 and subject to cross-examination.

^c See tit. DEPOSITIONS.

^d There are also some exceptions which have been introduced by, and which wholly depend upon, particular statutes; but as these are mere arbitrary exceptions, unconnected with general principles, they need not be noticed here.

The topic of the admissibility of evidence derived through the testimony of others will shortly be discussed, but before dismissing the present portion of the subject of excluding principles, another rule which operates to the exclusion of evidence, not generally, but on comparison with other and more satisfactory evidence, as well as some other minor rules, ought to be noticed. It is a general rule of evidence already adverted to, that evidence of an *inferior degree* shall not be admitted whilst evidence of a *higher* and more satisfactory degree is attainable.¹ This rule, it will be seen, depends on a well-founded jealousy that the best evidence is withdrawn, and the inferior substituted, from a desire to suppress the truth. As this is a principle which affects the course and order of proofs, its application will be better considered hereafter, in conjunction with other rules applicable to the nature and modes of proof.

There are, also, some instances where the law excludes particular evidence, not because in its own nature it is suspicious or doubtful, but on grounds of public policy, and because greater mischief and inconvenience would result from the reception than from the exclusion of such evidence; on this account it is a general rule that the husband and wife cannot give evidence to affect each other, either civilly or criminally. For to admit such evidence would occasion domestic dissension and discord; it would compel a violation of that confidence which ought, from the nature of the relation, to be regarded as sacred; and it would be arming each of the parties with the means of offence, which might be used for very dangerous purposes.*

*[40] Upon the same principle, the law prohibits a barrister, solicitor, or attorney, from divulging that which has been reposed in him confidentially by his client.² This prohibition

¹ Co. Litt. 6, b. See Vol. II., HUSBAND AND WIFE. The rule, it will be seen, does not extend to criminal charges founded on violence offered to the wife, and the County Courts Act, 9 & 10 Vict. c. 95, s. 83, also creates an exception to it.

¹ *Taylor v. Riggs*, 1 Peters, S. C. Rep. 596; *Cutbush v. Gilbert*, 4 Serg. & Rawle, 551; *Duckwall v. Weaver*, 2 Ohio, 13.

² To exclude the testimony of counsel it is not necessary that there should be a cause depending in court at the time that his information on the subject was acquired; *Beltzhoover v. Blackstock*, 3 Watts, 20.

A counsel or attorney may give evidence of collateral facts, such as that a bond was lodged with his client, by way of indemnity, or that his client expressed himself satisfied with a certain security; *Heister v. Davis*, 3 Yeates, 4.

So, when an attorney without any communication from his client, acquires a

rests on very obvious principles of convenience and policy. It is absolutely essential to the ends of justice that the fullest confidence should prevail between a litigant and those who conduct his cause: and it is equally clear that there would be an end of all such confidence, if the agent could be compelled to divulge all he knew. It is sufficient here, according to the plan originally proposed, to state this principle generally: its practical operation and effect, as to the relative situation of the parties when the communication was made, the nature, time, and manner of the communication, will be discussed hereafter.^f It may be observed here, that this is the privilege, not of the counsel or attorney, but of the client; and, therefore, that the former ought not to be allowed to divulge his client's secrets, even though he should be willing to do so.

The same principle evidently applies to the case of an attorney's or barrister's clerk, and of an interpreter between an attorney and his client.^g¹

^f See Vol. II., tit. CONFIDENTIAL COMMUNICATION.

^g *Du Barre v. Livette*, Peake, N. P. C. 77.

knowledge of his handwriting, he may be questioned as to its identity; *Johnson v. Duverne*, 19 Johns. 134.

And an attorney may be examined whether a note put into his hands to collect was endorsed or not; *Baker v. Arnold*, 1 Caines, 258; see also *Chirac v. Rheinecker*, 11 Wheat. 280; *Riggs v. Denniston*, 3 Johns. Cas. 198; *Brandt v. Klein*, 17 Johns. R. 335; *Jackson v. McVey*, 18 Johns. R. 330; *Hoffman v. Smith*, 1 Caines R. 157. And if, after the relation has ceased, a former client repeat to his attorney voluntarily, and without any artifice, and for that purpose, communications previously made, the attorney is a competent witness as to such communications; *Jordan v. Hess*, 13 Johns. R. 492.

An attorney, who was employed by two several defendants to defend a suit, and who entered an appearance for all the defendants, without the knowledge and consent of part of them, is a competent witness in a subsequent suit for contribution between the defendants who employed him, and those who did not; *Cox's Adr. v. Hill*, 3 Ohio Rep. 423.

A student in the office of an attorney, acquiring his knowledge of facts while he was in the office; *Andrews v. Solomon*, 1 Peters, 356; a confidential clerk; *Corp v. Robinson*, 2 Wash. C. C. Rep. 388; or a confidential agent or factor; *Holmes v. Comegys*, 1 Dall. 439; (dubitatum in *Morris v. Vanderen*, 1 Dall. 66;) or a physician; *Hewitt v. Prime*, 21 Wend. 79; is not privileged from becoming a witness.

G.

¹ *Rhoads v. Selin*, 4 Wash. C. C. Rep. 718; *Chirac v. Reinicker*, 11 Wheat. 280; *Jordan v. Hess*, 13 Johns. 492; *Parker v. Carter*, 4 Munford, 273; *Crawford v. McKissack*, 1 Porter, 433; *Jenkinson v. The State*, 5 Blackford, 465; *Chew v. Farmers' Bank*, 2 Maryland Ch. Decis. 231.

The privilege is not confined to facts disclosed in relation to suits pending, but

Here, however, the law draws the line, and the principle of policy which, in the instances of husband and wife, and of attorney and client, forbids a violation of confidence, ceases to operate.

extends to all cases in which a counsel or attorney is applied to, in the line of his profession, whether such facts were communicated with an injunction of secrecy or for the purpose of asking advice or otherwise; *Parker v. Carter*, 4 Munford, 273; *Beltzhoover v. Blackstock*, 3 Watts, 20; *Wheeler v. Hill*, 4 Shepley, 329; *Marsh v. Ludlum*, 3 Sanf. Ch. Rep. 35; *Crosby v. Berger*, 11 Paige, 377; *Aiken v. Kilburne*, 27 Maine, 252; *Bank of Utica v. Mersereau*, 3 Barb. Ch. R. 528; *McLellan v. Longfellow*, 32 Maine, 494; *Weatherbee v. Ezekiel*, 25 Vermont, 47; *Riley v. Johnston*, 13 Georgia, 260; *Parkhurst v. McGraw*, 24 Mississippi, 134.

Attorneys are bound to testify as to any matter concerning their clients which has come to their knowledge in any other way than by confidential communication; *Rhoads v. Selin*, 4 Wash. C. C. Rep. 718; *Rogers v. Dare*, Wright, 136; *Hiester v. Davis*, 3 Yeates, 4; *Johnson v. Duverne*, 19 Johns. 134; *Coolney v. Tannahill*, 1 Hill, 33; *Bogert v. Bogert*, 2 Edw. Ch. Rep. 399; *Granger v. Warrington*, 3 Gilman, 299; *Levors v. Van Buskirk*, 4 Barr, 309; *Pierson v. Strortz*, 1 Morris, 136.

Counsel may be asked by whom he was retained; *Chirac v. Reinecker*, 11 Wheat. 280; *Brown v. Payson*, 6 N. Hamp. 443; *Cox v. Hill*, 3 Hammond, 411; *Caniff v. Myers*, 15 Johns. 246; *Gower v. Emery*, 6 Shepley, 79; *Wheeler v. Hill*, 4 Shepley, 329.

If, after the relation of attorney and client has ceased, the client voluntarily repeat to the attorney what he has communicated while that relation existed, he is a competent witness as to this communication; *Fordon v. Hess*, 13 Johns. 492.

An attorney is not privileged as a witness from communicating facts, concerning his client, where he is himself a party to the transaction or agreement, which he is called upon to disclose; therefore it was held that an attorney who was summoned as garnishee in an attachment sur judgment, was bound to answer interrogatories as to whether he had received from his client a sum of money, in trust to pay a certain per centage, to such of his creditors as would accept the same in full satisfaction of their respective debts; *Jeanes v. Fridenberg*, 5 Penna. Law Journal, 65.

An attorney is not to judge what is or is not privileged. He must state the occasion and circumstances of the act or communication, and the general nature of the matter alleged to be privileged, so that the court may decide, whether he shall be compelled to testify in regard to it or not; *Jeanes v. Fridenberg*, 5 Penna. Law Journal, 65.

This rule does not however apply when the client has no interest in the suit in which the attorney is called to testify. Therefore in an action by the payee against the maker of a promissory note, in which the defence was that the amount of the note had been paid by an assignment made by the defendant to the plaintiff, of a mortgage given to the defendant, and it appeared that a suit had been brought by the assignee upon the mortgage, and that it had failed on the ground of the mortgage having been paid previously to the assignment, it was held, that the attorney and counsel of the mortgagor might be required to testify on the part of the plain-

The law will not permit any one to withhold from the information of the jury any communication which is important as evidence,

tiff as to facts, respecting the payment of the mortgage, which he had acquired as attorney; *Hamilton v. Neel*, 7 Watts, 517.

A debtor requested an attorney to draw up a mortgage of his personal property, and disclosed the purpose of the transaction, but neither asked nor received any legal advice as to its effect—the attorney's testimony as to such disclosure is admissible; *Hatton v. Robinson*, 14 Pick. 416; Contra, *Bank of Utica v. Mersereau*, 3 Barb. Ch. Rep. 528; *Moore v. Bray*, 10 Barr, 519; *Crisler v. Garland*, 11 Smedes & Marsh. 136.

Communications made to an attorney in his professional capacity, by an owner of property, respecting a transfer of it, are privileged; *Foster v. Hall*, 12 Pick. 89; *Beltzhoover v. Blackstock*, 3 Watts, 20.

A communication voluntarily made to counsel, after he has refused to be employed by the party making it, does not come within the rule of confidential communications; *Sitzar v. Wilson*, 4 Iredell, 501; *Beeson v. Beeson*, 9 Barr, 279. But not such as are made before; *Reed v. Smith*, 2 Carter, 160.

An attorney who draws up a will is competent to testify of its contents, in order to set it up as a last will; and his testimony is not subject to the objection that it discloses confidential communications of a client; *Graham v. O'Fallon*, 4 Missouri, 338.

Counsel professionally consulted may be compelled to testify, if the privilege be waived by the party who consulted him, although the subject has been assigned to a third person who objects; *Benjamin v. Coventry*, 19 Wend. 353.

The seal of professional confidence has never been held to cover a communication made to an attorney to obtain professional advice or assistance as to the commission of a felony or any other crime, which is *malum in se*; *Bank of Utica v. Mersereau*, 3 Barb. Ch. Rep. 528.

An attorney or counsel, who, as such, has been intrusted with papers, is not bound to produce them in evidence on the call of the opposite party or of a third person; *Jackson v. Burtis*, 14 Johns. 391; *Lynde v. Judd*, 3 Day, 499; *Durkee v. Leland*, 4 Vermont, 612.

Yet he may be called on to prove the existence of such papers, and that they are in his possession, so as to enable the opposite party, on the attorney's refusal to produce them, to give parol evidence of their contents; *Rhoads v. Selin*, 4 Wash. C. C. Rep. 718; *Brandt v. Klein*, 17 Johns. 335; *Jackson v. McVey*, 18 Johns. 330; *Coolney v. Tannahill*, 1 Hill, 33.

A party wishing to avail himself in evidence of a paper in possession of his adversary's attorney, must give notice to produce it: he cannot compel its production by a subpoena to the attorney; *McPherson v. Rathbone*, 7 Wendell, 216.

The privilege does not apply to a student in the office of an attorney; *Barnes v. Harris*, 7 Cushing, 576; *Andrews v. Solomon*, Peters C. C. Rep. 356; *Holman v. Kimball*, 22 Vermont, 555. Nor to a stranger casually present; *Jackson v. French*, 3 Wendell, 337.

Facts stated to an attorney to show that the cause in which he is thought to be retained, does not conflict with the interests of a client for whom he is already employed are not confidential communications; *Heaton v. Findlay*, 12 Penna. State Rep. 304.

however secret and confidential the nature of that communication may have been, although it may have been made to a physician or a surgeon, or even to a divine, in the course of discharging his professional duties; for it has even been held, that a minister is bound to disclose that which has been revealed to him as a matter of religious confession.^{h 1}

*41] *Upon a principle of humanity, as well as of policy, every witness is protected from answering questions by doing which he would criminate himself.² Of policy, because it

^h *Butler v. Moore*, Macnally, 253; *Vaillant v. Dodemead*, 2 Atk. 524; *R. v. Gilham*, Mood. C. C. 186.

¹ That a confession made to a Roman Catholic priest is not evidence, see *Smith's Case*, 1 Rogers' Rec. 77; Contra, per Gibson, C. J.; *Simon's Exrs. v. Gratz*, 2 Penna. Rep. 417. But confessions to a Protestant divine are not privileged; *Smith's Case*, Supra; *Commonwealth v. Drake*, 15 Mass. 161. See *Phillip's Case*, Sampson's Roman Catholic Question in America, Pamphlet.

Witnesses must testify what a party told to them in confidence and under an engagement of secrecy, unless they are attorneys of the party in the cause; *Mills v. Griswold*, 1 Root, 383.

² To excuse a witness from answering a question on this ground, the court must see that the answer may in some way criminate the witness or render him infamous, involve him in shame or reproach, or expose him to penalties or punishment, in any of which cases he is not bound to answer a question; *The People v. Mather*, 4 Wend. 229; *Territory v. Nugent*, 1 Mart. R. 114; *Vandervoort v. The Col. Ins. Co.*, 3 Johns. Case, 137; *Jackson v. Humphrey*, 1 Johns. R. 498; *Grannis v. Brandon*, 5 Day, 260; *Respublica v. Gibbs*, 3 Yeates, 429, 437; *Galbraith v. Eichelberger*, 3 Yeates, 515; *Vaugh v. Perrine*, 2 Penna. 728; *Marbury v. Madison*, 1 Cranch, 144. The rule of practice upon this subject was thus stated by the late chief justice of the United States, "It is the province of the court to judge whether any direct answer to the question, which may be proposed, will furnish evidence against the witness. If such answer may disclose a fact, which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be, and if he says on oath he cannot answer, without accusing himself, he cannot be compelled to answer." *United States v. Burr*, 1 Burr's Trial, 245; see also *State v. Edwards*, 2 Nott & M'Cord, 13. A witness may be asked a question, the answer to which will criminate him; and if he has no objection, may answer it; his privilege is personal only; but it is the duty of the court to advertise him of it; *Southard v. Rexford*, 6 Cowen, 254. And if a witness voluntarily state a fact, he is bound to state how he knows it, though it criminate him; *State v. K.* 4 N. Hamp. R. 562. Thus a witness cannot be compelled to say whether or not he had ever had criminal connection with the plaintiff. *Ibid.* Nor whether he had not been convicted of petit larceny, and whether he was not then in confinement under that conviction; *The People v. Herrick*, 13 Johns. 82.

would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors.¹ It is pleasing to contrast the humanity and delicacy of the law of England in this respect with the cruel provisions of the Roman law, which allowed criminals, and even witnesses in some instances, to be put to the torture, for the purpose of extorting a confession.¹

There are some instances in which particular evidence is excluded on the ground of policy, where the disclosure might be prejudicial to the community. Thus, in a state prosecution, a witness cannot be called upon to disclose the names of those to

¹ It is partly upon this principle that an examination of a prisoner, taken before a magistrate on oath, cannot be afterwards read against him as a confession. And evidence extorted in violation of this privilege cannot be used to establish an indictment for the crime against the witness; *Reg v. Garbett*, 2 Car. & K. 474; Eng. C. L. R. 61.

¹ See Quintilian's Inst.; C. De Tormentis, Pan. lib. 48, s. 242. See the cases on this subject collected, *post*, tit. WITNESS.

But a witness may be called and examined in a matter pertinent to the issue when his answers will not expose him to criminal prosecution, or tend to subject him to a penalty or forfeiture, though they may otherwise affect his pecuniary interest; *Bull v. Loveland*, 10 Pick. 9; *Taney v. Kemp*, 4 Har. & Johns. 348; *Stoddart v. Manning*, 2 Har. & Gill, 147; *Baird v. Cochran*, 4 Serg. & R. 397; *Nass v. Van Swearingen*, 7 Serg. & R. 192; *Gorham v. Carol*, 3 Lit. 221; *Canover v. Bell*, 6 Monroe, 157; *Copp v. Upham*, 3 N. Hamp. R. 159; *Commonwealth v. Thurston*, 7 J. J. Marshall, 63; *Planters' Bank v. George*, 6 Martin, 670.

Contra, *Benjamin v. Hathaway*, 3 Conn. R. 528; *Storrs v. Wetmore*, Kirby, 203; *Starr v. Tracy*, 2 Root, 528; *Cook v. Corn*, 1 Overton, 340; *Appleton v. Boyd*, 7 Mass. R. 131. Per Marshall, C. J., *United States v. Grundy*, 3 Cranch, 344; *Tatem's Executors v. Lofton*, Cooke, 115. So in the case of liability to a forfeiture of money won at play, a party must answer on a bill of discovery; *Slaman v. Kelly*, 4 Young & Collyer, 169; see also *Mauran v. Lamb*, 7 Cow, 174.

G.

¹ *People v. Herrick*, 13 Johns. 82; *Grannis v. Brandon*, 5 Day, 260; *State v. Bailey*, 1 Penn. 415; *United States v. Craig*, 4 Wash. C. C. Rep. 729; *Poin-dexter v. Davis*, 6 Grattan, 481.

It is not confined however to cases where the answer of the witness would render him liable to a criminal proceeding or penalty. It is enough if his answer will have a tendency to stigmatise or disgrace him; *Vaughn v. Paine*, 2 Penn. 728; *Sodusky v. McGee*, 5 J. J. Marshall, 621; *United States v. Dickinson*, 2 McLean, 325; *The People v. Rector*, 19 Wendell, 569; *Lohman v. People*, 1 Comst. 379; *Contra*: *Clementine v. State*, 14 Missouri, 112.

It is however the privilege of the witness, and he may waive it if he thinks proper; *Fries v. Brugler*, 7 Halsted, 79; *Southard v. Rexford*, 6 Cowen, 254;

whom he has given information of practices against the State, whether such persons be magistrates, or concerned in the administration of government, or be merely the channel through which

Sodrusky v. McGee, 5 J. J. Marshall, 621; *The State v. Patterson*, 2 Iredell, 346; *Short v. The State*, 4 Harring, 568; *Howel v. The Commonwealth*, 5 Grattan, 664; *Commonwealth v. Shaw*, 4 Cushing, 594.

If the witness voluntarily states a fact, he is bound to state how he knows it, although in so doing he may expose himself to a criminal charge. If he state any part he must state the whole; *State v. K.*, 4 N. Hamp. 562; *Chamberlin v. Willson*, 12 Vermont, 491; *Amherst v. Hollis*, 9 N. Hamp. 107; *People v. Lohman*, 2 Barb. Sup. Ct. Rep. 216; *The State v. Foster*, 3 Foster, 348.

The matter need not be directly criminal, if it has a tendency to subject him or will form a link in the evidence, the witness is entitled to object and the witness and not the court is the judge of that; *State v. Edwards*, 2 Nott & M'Cord, 13; *People v. Mather*, 4 Wend. 229; *Poole v. Perritt*, 1 Speers, 128; *Chamberlin v. Wilson*, 12 Verm. 491; *The People v. Rector*, 19 Wend. 569; *Robinson v. Neal*, 5 Monroe, 212; *Lister v. Boker*, 6 Black. 439; *The People v. Bodine*, 1 Denio, 281; *Henry v. Salina Bank*, 1 Comstock, 83. But see *Richman v. The State*, 2 Greene, 532; *Floyd v. The State*, 7 Texas, 215.

Although the witness is his own judge as to whether his answer would criminate himself, he is nevertheless liable to an action by the party for a refusal to testify, if his refusal be wilful and his excuse false; *Warner v. Lucas*, 10 Ohio, 336.

Though the case may be otherwise when a question is put on cross-examination, in order generally to degrade and disgrace the witness, yet when a question having such tendency is part of an examination in chief, and its answer is essential to the case of the party *bona fide* putting it, the court will compel an answer, when it will not expose the witness to a criminal prosecution; *Keller's case*, 1 Wharton's Digest, 726.

When a witness called to establish a defence of usury, declines to testify on the ground that his evidence may expose him to an indictment or subject him to a penalty, and it appears that the statute of limitation has barred all prosecutions, the court is bound to pronounce against his claim to exemption; *Close v. Olney*, 1 Denio, 319; *Bank of Salina v. Henry*, 2 Denio, 155, 3 Denio, 593, 1 Comst. 83; *Weldon v. Burd*, 12 Illinois, 374; *Floyd v. The State*, 7 Texas, 215.

There is no legitimate inference of guilt from the refusal of a witness to answer, upon which the jury can act; *Carno v. Litchfield*, 2 Michigan, 340.

A liability however to a civil action or pecuniary loss will not privilege the witness from answering; *Bull v. Loveland*, 10 Pick. 9; *Hays v. Richardson*, 1 Gill. & Johns. 366; *Tancey v. Kemp*, 4 Har. & Johns. 348; *Naylor v. Semmes*, 4 Gill. & Johns. 273; *Copp v. Upham*, 3 N. Hamp. 159; *Baird v. Cochran*, 4 Serg. & Rawle, 397; *Commonwealth v. Thurston*, 7 J. J. Marshall, 62; *Alexander v. Knox*, 7 Alabama, 503; *Judge of Probate v. Green*, 1 Howard, (Miss.) 146; *Zollicoffer v. Turney*, 6 Yerger, 297; *Louney v. Perham*, 2 Appleton, 235; *Conover v. Bell*, 6 Monroe, 157; *Stevens v. Whitcomb*, 16 Vermont, 121; *Matter of Kip*, 1 Paige, 601; *Stewart v. Turner*, 3 Edw. Ch. 458; *Nass v. Van Swearingen*, 7 Serg. & Rawle, 192; *Ralph v. Brown*, 3 Watts & Serg. 400.

information is communicated to government.^k So a witness was not allowed to answer the question, whether he had delivered a short-hand note to an under secretary of state;^l and so it was held, that an officer from the Tower of London could not be examined as to the accuracy of a plan of the Tower which was produced.^m Upon the same ground, *an official communication between the governor of a colony and the law officers there, relating [42 to the state of the colony cannot be disclosed.ⁿ So it seems that the orders given by the governor of a foreign colony to a military officer acting under his command, ought not to be produced.^o The same objection applies to letters written by a secretary of state to a person acting under his authority;^p and, as it seems, to minutes taken before the privy council.^q

The principle does not exclude a communication which, although made to an official person, is not made in the discharge of any public duty.^r¹

^k *R. v. Watson*, 2 Starkie's C. 135; Eng. C. L. R. 3; and a note from *Hardy's Case*, by Abbott, J., ib. 136; and Lord Ellenborough's observations as to *Stone's Case*, ib. 137; 24 Howell's State Tr. 753.

^l 32 Howell's State Tr. 100; see also *De Berenger's Case*, Gurney's Rep. 344.

^m *R. v. Watson*, 2 Starkie's C. 148; Eng. C. L. R. 3.

ⁿ *Wyatt v. Gore*, Holt's C. 299; Eng. C. L. R. 3.

^o *Cooke v. Maxwell*, 2 Starkie's C. 185; Eng. C. L. R. 3. The document was there called for, in order to prove that the plaintiff's factory had been destroyed in consequence of orders from the defendant; and it was held, that although on principles of public convenience the document could not be read, the effect was the same as if the document had not existed, and that the witness might be asked whether what had been done had not been done by order of the defendant.

^p 2 Starkie's C. 185; Eng. C. L. R. 3.

^q 6 St. Tr. 281, *Layer's Case*. Where the commander-in-chief directed the defendant, a major-general, with six other officers, to inquire into the conduct of a plaintiff, and to report the opinion of the officers, and the plaintiff brought an action for an alleged libel contained in that report, and the secretary of the commander-in-chief attended with the minutes of the report, the Court refused to allow it to be read. *Home v. Bentinck*, 2 B. & B. 130; Eng. C. L. R. 6. So official communications between an agent of government and a secretary of state, *Anderson v. Sir W. Hamilton*, 2 B. & B. 156; Eng. C. L. R. 6; and between the East India Company and the Board of Control, *Smith v. East India Company*, 1 Phill. 50, are also privileged. For further observations on this subject, see tit. WITNESS

—CONFIDENTIAL COMMUNICATION.

^r *Blake v. Pilfold*, 1 M. & Rob. 198; which was the case of a letter written by a private person to the secretary of the postmaster-general, complaining of the conduct of the guard of a mail.

¹ An officer, by whom a person was apprehended, is not bound to disclose the

*43]

*CHAPTER III.

MEDIATE AND SECONDARY EVIDENCE.

NEXT, as to the admissibility of evidence derived not immediately from those who have, or are supposed to have, actual knowledge of the fact, but through the testimony of one or more other witnesses.

Such testimony is in general of so inferior a nature as to be admissible only in cases of urgency, on the failure of better evidence, and under the sanction of particular circumstances, which warrant its admissibility, but in some instances is admissible without any proof of the failure of better evidence. Thus general reputation is in many instances receivable, although it may rest on no other foundation than what the witness may have heard from others.*

General reputation is the general result or conclusion formed by society as to any public fact or usage, by the aid of the united knowledge and experience of its individual members: such a gene-

* See tit. CUSTOM—MARRIAGE—PEDIGREE—PRESCRIPTION.

name of a person from whom he received the confidential information which led to the prisoner's detection; *United States v. Moses*, 4 Wash. C. C. Rep. 726. But he is bound to answer whether A. B. (the person in whose house the defendant was apprehended on a charge of forgery, and where he was discovered at a table with bank notes) had not told him, that if he would come to his house on a certain day, he would have the prisoner there; for the defendant might repel the presumption of guilt against him by showing that he was at the house in consequence of the insidious invitation of the owner of it; *Ibid*; S. P.; *United States v. Craig*, 4 Wash. C. C. Rep. 729.

The governor, to whom a deposition has been addressed, preferring accusations against a person in office, must exercise his own judgment with respect to the propriety of producing the writing; a *subpœna duos tunc* will not be issued against him for it; *Gray v. Pentland*, 2 Serg. & R. 23. G.

It is intimated by the court, in the case of the *United States v. Burr*, that the President of the United States is not obliged to disclose communications made to him in his official capacity, if the public good requires that they should be suppressed; 1 Robertson, Rep. of Burr's Trial, 186, 187. So in *Marbury v. Madison*, 1 Cranch, 144, it was held that a former Secretary of State was not obliged to disclose facts which had been communicated to him in confidence, while in office. M.

This privilege has been extended to a private prosecutor, not in office; *The State v. Soper*, 4 Shepley, 293.

ral concurrence and coincidence of opinion on facts known to many, affords a reasonable degree of presumption that their conclusion is correct;^b and therefore in particular cases, where the fact is of a public nature, general reputation is admissible evidence to prove it. But as it would not be necessary, and otherwise would not be practicable, to examine the whole body of society as to the prevalence of general reputation on any particular fact, it is sufficient to call individual witnesses, a portion of society, who can, under the sanction of an oath, and subject to cross-examination, pledge their personal knowledge that such reputation exists.

*It is observable that, in one respect, such evidence can scarcely be considered as forming an exception to the general [*44 rule which requires the sanction of an oath and the opportunity to cross-examine; for the witnesses are called to prove what they actually know, viz., that such a reputation exists: they are sworn and subject to cross-examination, and the very nature of such evidence excludes any more solemn sanction.

The particular subjects to which such evidence is applicable require further consideration.

It is to be observed that many facts, from their very nature, either absolutely or usually exclude direct evidence to prove them, being such as are in ordinary cases imperceptible by the senses, and therefore incapable of the usual means of proof. Among these are questions of pedigree or relationship, character, prescription, custom, boundary, and the like. Such facts, some from their nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses; and, consequently, resort must be had to the best means of proof which the nature of the cases affords. Now the knowledge of facts of this description consists either in the knowledge and recollection of that part of society which has had the means of observing them, or in the traditionary declarations of those who were likely to have possessed a knowledge on the subject, derived either from their own observation, or the information of others; or, lastly, in questions of skill and judgment, the knowledge of the relation must be derived from those who are possessed of the proper qualifications for forming a conclusion on the subject. The character of a particular individual in society is formed by society from their experience and observa-

^b See *Du Bost v. Beresford*, 2 Camp. 512; per Gibbs, C. J., *Gurr v. Rutton*, Holt, Ca. 327; Eng. C. L. R. 3; *Oliver v. Bartlett*, 1 B. & B. 269; Eng. C. L. R. 5.

tion of the conduct of the individual; and here reputation is not so much a circumstance from which the character of the individual is to be presumed, as the very fact itself, proved by the direct evidence of witnesses who constitute part of that society. The knowledge of the existence of a particular *public custom does not *45] reside peculiarly in the breast of any one individual whatsoever, but in the opinion and conclusions which society, or some indefinite part of it, have collected from actual observation and experience.

In the case of *pedigree*, the nearest relation, even that of parent and child, can seldom be proved, after the death of the parents, by direct evidence; and no knowledge upon the subject exists except that which is inferred from circumstances, or derived from the hearsay testimony of those who, from their intimacy with the family, possessed peculiar means of knowledge. The circumstance that the parents cohabited as husband and wife, acknowledged and addressed each other in society as such; that they recognised and educated children as their own, and introduced them to the world on a variety of occasions as their legitimate offspring; that a pedigree was hung up in the family mansion, stating the different degrees of relationship of the members of the family; that similar entries were made in a family bible; that a monument or tombstone was exhibited to the public, announcing a relation between the deceased and the surviving, or deceased and late, members of a family; all such circumstances are either strictly facts, or are solemn and deliberate declarations accompanying facts, and partaking of the nature of facts, which, in the absence of all suspicion of fraud, afford the strongest presumptions that the parties really did stand in the relative situation of husband and wife, parents and children, or other degree of kindred; for it is improbable that such circumstances should have been acted with a view to deceive, particularly in a manner so open and public as to render the fraud liable to immediate detection. From such circumstances the belief is formed, by those who are acquainted with the family, and a *reputation* obtains in society that they are so related; for reputation seems to be no more than hearsay, derived from those who had the means of knowing the fact. Hence it is that the reputation may exist when those who were best acquainted with *the fact are dead; and that such reputation and even tradi- *46] tionary declarations become the best, if not the only, means of proof; and when they are derived from those who are most

likely to know the truth, and who lay under no bias or influence to misrepresent the fact, they afford a fair and reasonable presumption of the truth of the fact.¹

Again: upon questions of fact, to which antiquity is essential, as of prescription, custom and boundary, (and also of pedigree, where the relationship is to be traced through a remote ancestor,) the evidence of living witnesses is of little avail, except as to the observance of the right, privilege or obligation, in modern times; for any knowledge concerning such rights, drawn from times more remote, recourse must be had to reputation and tradition; such evidence being supported by proof of the enjoyment of such rights and privileges, and of acquiescence in them in more recent times.²

¹ Pedigree and relationship, marriage and death, may be proved by general reputation; *Johnson v. Howard*, 1 Har. & McHen. 281; *Pancoast v. Addison*, 1 Har. & Johns. 350; *Morgan v. Purnell*, 4 Hawks, 95; *Ewing v. Savary*, 3 Bibb, 235; *Ewell v. The State*, 6 Yerger, 364; *Flowers v. Haralson*, Ibid. 494; *Stegall v. Stegall*, 2 Brock. 256; *Morton v. Barrett*, 19 Maine, 109; *Copes v. Pearce*, 7 Gill, 247; *Prince v. Stewart*, 7 Texas, 175; *Watson v. Brewster*, 1 Barr, 381.

Hearsay evidence of such facts are therefore admissible; *Jackson v. Boneham*, 15 Johns. 226; *Strickland v. Poole*, 1 Dall. 14; *Jackson v. Cooley*, 8 Johns. 128; *Elliott v. Piersoll*, 1 Peters, 328; *Waldron v. Tuttle*, 4 N. Hamp. 371; *Scott v. Ratchliffe*, 5 Peters, 81; *Carter v. Buchanan*, 9 Georgia, 539.

But hearsay evidence of the place of a man's birth or death, is inadmissible; *Independence v. Pompton*, 4 Halstead, 209; *Wilmington v. Burlington*, 4 Pick. 174; *Brooks v. Clay*, 3 A. K. Marshall, 545.

The hearsay evidence, admissible in cases of pedigree is limited to those connected with the family, who are supposed to have known the relationships existing, and such hearsay declarations must have been made before suit commenced; *Stein v. Bowman*, 13 Peters, 209; *Jackson v. Browner*, 18 Johns. 37; *Waldron v. Tuttle*, 4 N. Hamp. 371; *Chapman v. Chapman*, 2 Cox, 347; *Saunders v. Fuller*, 4 Humph. 516; *Greenwood v. Spilloe*, 2 Scam. 502; *Matter of Hall*, 1 Wallace, Jr., 85; *Copes v. Pearce*, 7 Gill, 247; *Boudereau v. Montgomery*, 4 Wash. C. C. Rep. 186; *Dussell v. Roe*, 1 Wallace, Jr., 39.

To let in the declarations of third persons in case of pedigree, it must be shown that they are dead; *White v. Strother*, 11 Alabama, 720; *Covert v. Hertzog*, 4 Barr, 145; *Fuller v. Nutz*, 5 Serg. & Rawle, 251.

² Boundaries may be proved by reputation, and it is not confined in the United States to boundaries between manors and parishes, but extends to private estates, and the lines of old surveys; *Smith v. Howell*, 2 Litt. 159; *Rufoll v. Stocking*, 8 Conn. 236; *Boardman v. Reed*, 6 Peters, 328; *Wooster v. Butler*, 13 Conn. 309; *Nieman v. Ward*, 1 Watts & Serg. 68; *Ellicott v. Pearl*, 1 McLean, 206; *Caufman v. Cedar Spring Congregation*, 6 Binn. 59; *Wolf v. Wyeth*, 11 Serg. & Rawle, 149; *Hamilton v. Minor*, 2 Ibid. 70.

But the declarations of those who could themselves be had as witnesses are not

On these grounds therefore, general reputation is admissible evidence, as affording presumptions upon which juries are to exercise their discretion in cases of this nature. Such instances have, it seems, been regarded as anomalous, and as forming exceptions to the general rule which has already been noticed, viz., that mere naked declarations are too vague, uncertain and fallacious, to afford sufficient presumptions for the consideration of a jury.^c Such evidence is at all events warranted by the necessity of the case. The particular objection which excludes mere hearsay in general does not apply to those cases which are of a public nature, which may be presumed to be matter of public notoriety, as in the instance of public prescriptions, customs and character, and where reliance is placed not on the credit due to the assertion of a single individual, but is sanctioned by the concurrent opinion and assent of indefinite numbers; in such cases a presumption exists that the truth of the fact is known and faithfully communicated.

Hence, therefore, common reputation is evidence to *prove,
 *47] 1st, a man's character in society;^d 2ndly, reputation, and (as will afterwards be seen) traditionary declarations are evidence to prove a pedigree, including the state of a family as far as regards the relationship of its different members, their births, marriages, and deaths; 3rdly, reputation and traditionary declarations are evidence to prove certain prescriptive or customary rights and obligations, and matters of public notoriety. But inasmuch as the reception of such evidence is founded upon the supposition that the persons from whom it is derived possessed the means of knowledge; and since such evidence is in its own nature very weak, unless it be supported by other circumstances,^e

^c *Per* Lord Ellenborough, C. J., *Weeks v. Sparke*, 1 M. & S. 686; Eng. C. L. R. 28.

^d See tit. CHARACTER.

^e *Per* Lord Ellenborough, 1 M. & S. 686; Eng. C. L. R. 28.

admissible. *Lamar v. Minter*, 13 Alabama, 31; *Buchanan v. Moore*, 10 Serg. & Rawle, 275.

Possessions of ancient date, of which there can be no living witnesses, and of which no written evidence can be presumed to exist may also be thus established; *Casey v. Inloes*, 1 Gill, 430.

Reputation is not admitted upon questions of freedom; *Walls v. Helmsley*, 4 Har. & Johns. 243; *Gregory v. Baugh*, 4 Rand. 611.

Contra, *Mahoney v. Ashton*, 4 Har. & McHen. 63, 295; *Chancellor v. Milly*, 9 Dana, 23.

the following sanctions appear to be necessary to warrant a presumption from such evidence.

First, in order to warrant such a presumption, the fact to which the reputation or tradition applies, must in general be of a *public* nature; for otherwise it cannot be presumed that the persons from whom the knowledge is derived possessed the means of knowledge, or if they did possess the means, that their attention and observation were attracted to it: and therefore such evidence is admissible in cases of character, public prescriptions, and customs relating to manors,^f and parishes, and of rights of common, public boundaries and highways.^g Such evidence is also received with respect to the existence of a *modus*,^h or a right to free warren,ⁱ because, although they are in strictness private rights, yet they affect a great number of occupiers within a district.^k

So where the defendant in trespass pleaded a prescriptive right of common over the *locus in quo*, at all times, for his cattle levant and couchant, and the plaintiff, in his replication, prescribed in right of his messuage to use the **locus in quo* for tillage with corn, and until the taking in of the corn to hold and enjoy [*48 the same in every year, and traversed the defendant's prescription, on which issue was joined, it was held^l that many persons besides the defendant having a right of common over the *locus in quo*, evidence of reputation, as to the right claimed by the plaintiff, was admissible, a foundation having been first laid, by evidence of the enjoyment of such right. But it seems to be now settled, although the question was long *sub judice*, that general evidence of reputation is not admissible in the case of a private prescription or other claim. In the case of *Moorewood v. Wood*,^m the question was whether general evidence of reputation as to a prescriptive right of digging stones on the lord's waste, annexed to a particular estate, was admissible; and the Judges were divided upon it. In *Outram v. Morewood*,ⁿ Lord Kenyon said, "that although a general

^f *Barnes v. Mawson*, 1 M. & S. 77; Eng. C. L. R. 28.

^g 1 M. & S. 686; Eng. C. L. R. 28; 6 M. & W. 234; see tit. CUSTOM—PRESCRIPTION, &c.

^h 2 Ves. 512; Gwill. 854.

ⁱ 13 M. & W. 332.

^k *Per Dampier, J.*, 1 M. & S. 691; Eng. C. L. R. 28; see tit. TITHES.

^l *Weeks v. Sparke*, 1 M. & S. 679; Eng. C. L. R. 28; *Pritchard v. Powell*, 10 Q. B. 589; Eng. C. L. R. 59.

^m 32 Geo. III., B. R. 14 East, 327, in note.

ⁿ 5 T. R. 123.

right might be proved by traditionary evidence, a particular fact could not." There the question was, whether Cow Close had been part of the estate of Sir *J. Zouch*, out of which certain rents and coals had been reserved; and the Court held that the fact could not be proved by entries made by a third person deceased, in his books of receipts of rents from his tenant, such entries being considered as no more than a declaration of the fact by such third person; which was different from entries by a steward, who thereby charged himself with the receipt of money. In *Doe v. Thomas*,^o where in an action of ejectment the lessor of the plaintiff claimed as tenant in tail under the will of *A.* who gave *B.* his son an estate for life, and the defendant claimed as the devisee of *B.*, the question was, whether the land in dispute was part of the entailed estate, or had been purchased by *B.*; it was held that evidence of *49] reputation* that the land had been purchased of *J. S.* by *A.* was inadmissible.^p And although traditionary reputation is evidence of boundary between two parishes and manors,^q it is not evidence of boundary between two private estates.^{r1} Upon the principle that it is a matter of general and public notoriety, a particular historical fact may, as it seems, be proved by reputation of the fact, and (as falling within the scope of such evidence) by a generally received historical account of it.^{s2}

^o 14 East, 323.

^p In *The Bishop of Meath v. Lord Belfield*, B. N. P. 295, it was held that evidence of reputation was admissible, in *quare impedit*, to prove that one *Knight* had been in by the presentation of one from whom the defendant claimed; but in *Re Eriswell*, 3 T. R. 723, Lord Kenyon denied that this case was law.

^q *Nicholls v. Parker*, Ex. Summer Ass. 1805, *cor. Le Blanc, J.*, Taunton, 1795; *R. v. Parrish of Hammersmith*, Sitt. after Hil. 1776; *Down v. Hale*, *cor. Lawrence*, see 14 East. 331; Peake, Ev. App. 33; *Ireland v. Powell*, Salop Sum. Ass. Peake, Ev. App. 33; *Brisco v. Lomax*, 8 Ad. & E. 198.

^r *Clothier v. Chapman*, 14 East, 331, in the note.

^s B. N. P. 248; 1 Salk. 282; 1 Vent. 151; Skin. 14, 623; and see *Thomas v. Jenkins*, 6 Ad. & E. 525; Eng. C. L. R. 51.

¹ That this is not the received law in the United States, see the cases cited in the note 2, p. 46. Ante.

² Historical facts of general and public notoriety may be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not pre-suppose better evidence in existence; and when from the nature of the transaction or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. The work of a living author who is within the reach of the process of the court can hardly

2ndly. Neither reputation nor traditionary declarations are admissible as to a particular fact.⁶ Evidence of reputation upon general points is receivable, because all mankind being interested in them, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them,⁷ all having the same means of information; but this does not apply to particular facts, which may not be notorious, which may be misrepresented or misunderstood, and which may have been connected with other facts by which their effect would be limited and explained. Such evidence would obviously be open to all the uncertainty, and liable to all the objections incident to mere hearsay evidence, and is therefore of too slight a nature to support any presumption. And, therefore, upon a question of modus, evidence of the declaration of an old person, since deceased, that so much per acre had always been paid in lieu of tithes, would [*50 be good evidence as to reputation; but a declaration by such a person that he paid so much in lieu of tithes would not be admissible, since it is a particular fact.⁸ So in those cases where evidence of perambulations is admitted, it is in the nature of hearsay evidence, not of particular acts done, as that such a turf was dug, or such a post put down in a particular spot; but it is evidence of the ambit of any particular place or parish, and of what the persons accompanying the survey have been heard to say and do on such occasion.⁹

3rdly. If the reputation or tradition relate to the exercise of a right of privilege, it should be supported by proof of acts of enjoyment of such right or privilege within the period of living memory;¹⁰ and when that foundation has been laid, then, inasmuch

⁶ Per Lord Kenyon, *Outram v. Morewood*, 5 T. R. 123.

⁷ Per Lord Kenyon, see *Morewood v. Wood*, 14 East, 329.

⁸ *Harwood v. Sims*, 1 Wight, 112.

⁹ Per Lord Ellenborough, 1 M. & S. 687; Eng. C. L. R. 28.

¹⁰ See the observations of the Judges in *Weeks v. Sparke*, 1 M. & S. 679; Eng. C. L. R. 28; and of Grose, J., 5 T. R. 32.

be deemed of this nature. He may be called as a witness; he may be examined as to the sources and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom he has derived his materials; there would seem to be cogent reasons to say that his book was not, under such circumstances, the best evidence within the reach of the parties; *Morris v. Harmar's Heirs*, 7 Peters, 554.

as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons conversant with the neighbourhood where the right is claimed, of what they have heard other old persons, who were in a situation to know what the rights were, say concerning them.^a

Another class of evidence, which is admissible, though the usual tests are inapplicable, consists of declarations made by one of the parties to a suit, in the nature of a confession or admission contrary to his own interest. Whatever a party voluntarily admits to be true, though the admission be contrary to his interest, may reasonably be taken for the truth. The same rule it will be seen applies to admissions by those who are so identified in situation and interest with a party that their declarations may be considered *51] to have been made by himself.^b *As to such evidence, the ordinary tests of truth are properly dispensed with; they are inapplicable: an oath is administered to a witness in order to impose an additional obligation on his conscience, and so to add weight to his testimony; and he is cross-examined to ascertain his means of knowledge, as well as his intention to speak the truth. But where a man voluntarily admits a debt or confesses a crime, there is little occasion for confirmation; the ordinary motives of human conduct are sufficient warrants for belief.

There is also another species of hearsay evidence, which in some instances may be referred to this class. Where a declaration accompanies an act, it is frequently admissible as part of the act itself. Such declarations, it will be seen, are more frequently used as collateral or indirect evidence from which some other fact is to be inferred, than as direct evidence of a fact; and as such will be afterwards considered. Suffice it to observe, for the present, that declarations are usually admissible where the fact which they accompany is material and admissible^c, and where the nature and quality of the act are also material; for in such instances a declaration accompanying the act may either be regarded as part of the act itself, or as the most proximate and satisfactory evidence for explaining and illustrating the fact.¹

^a 1 M. & S. 679; Eng. C. L. R. 28; 14 East. 330; 12 East, 65.

^b See Vol. II. tit. ADMISSIONS.

^c 7 Ad. & E. 361; Eng. C. L. R. 53; *R. v. Bliss*, Ibid. 550.

¹ The rules regulating the admissibility of declarations accompanying acts are difficult, if not impossible, to be defined; the general principles on which they are

Experience supplies a reasonable presumption that a declaration made by a person in doing an act, as to his intention and object, and where that person laboured under no temptation to deceive, was spontaneous, natural, and consistent with truth. The most usual example^d adduced in illustration of this doctrine, is that of a declaration made by a trader, at the time of deserting his house or place of business, as to his intention and object in so doing, in order to prove an act of bankruptcy. Here it is observable that the fact of departure is material: the question *is as to the nature and quality of the act, that is, as to the object and [*52 intention of the trader in doing that act; and to prove this, the declarations which he made at the time of leaving his house or counting-house, are constantly admitted in proof of his design, as being natural and spontaneous indications of the truth, although his subsequent declarations, even upon oath, would be absolutely rejected.

It is emphatically to be observed, that the rule admitting evidence of a declaration accompanying an act, is not founded on any general presumption that in every such case credit is to be given to the veracity of the declarant; for if that were so, and acted on as a general rule, the acts of strangers would be admissible for the purpose of sanctioning the admission of such declarations. But, as will be seen, the acts of strangers are excluded, for reasons as strong, if not stronger, than those which exclude the mere declarations of strangers; and as the transactions of mere strangers, not in themselves material to the subject of inquiry, are properly regarded as inadmissible, so likewise must declarations be excluded which depend for their credit on their connection with the acts of strangers.

^d See below, tit. WITNESS; Vol. II., tit. BANKRUPT.

founded are well stated in the text. These declarations are not received as proofs of facts—but as facts showing the motives for an act or the character of it; *Blight v. Ashley*, 1 Pet. C. C. Rep. 22; *Pool v. Bridges*, 4 Pick. 378; *Boyd v. Moore*, 11 Ib. 365; *Tompkins v. Saltmarsh*, 14 Serg. & R. 275. “When an act is done, to which it is necessary to ascribe a motive, it is always considered that what is said at the time, from whence the motive may be collected, is part of the *res gestæ*,” Per Rogers, J., *Gilchrist v. Ball*, 8 Watts, 358. Upon a question of boundary, the declaration of a deceased person who pointed out a line of marked trees, saying it was a known division line, was held to be admissible in evidence, as part of the *res gestæ*; but any further declaration made by him at the time of a fact material to the issue, was held to be inadmissible; *Van Dusen v. Turner*, 12 Pick. 532.

Whether, therefore, declarations accompanying acts are to be deemed of value from credit given to the declarant, or as being part and parcel of the collateral circumstances from which the jury are to draw their conclusion as to the nature and quality of the act itself, it is essential that the act itself should be material and admissible. If, for the sake of illustration, the question for what purpose a sum of money was paid by *A.* to *B.*, were material to the issue, what *A.* said to *B.* on paying the money would be most important, it may be, conclusive evidence. But if *A.* and *B.* were strangers to the cause, and the fact of payment were not material to the issue, then, although *A.* at the time of payment made a declaration as to the truth of a fact material to the issue, as that he had lost a wager betted on that fact, the declaration would neither
 *53] be evidence in itself nor as explanatory of the act of *A.*,
 *which, as being the act of a stranger, was also inadmissible.^{e 1}

These classes of evidence are distinguishable from all others by this characteristic difference, that such evidence may be resorted to in the first instance as original evidence, whilst all other mediate testimony is admissible only on a principle of necessity, as SECONDARY evidence, after the failure of evidence of a higher and more satisfactory nature.^f

^e The principle of admitting declarations as accompanying acts was much considered in the case of *Doe d. Tatham v Wright*, 7 Ad. & E. 313; Eng. C. L. R. 34; 5 Nev. & M. 132; Eng. C. L. R. 36; 4 Bing. N. C. 489; Eng. C. L. R. 33; 2 Nev. & P. 305.

^f There is this essential distinction between a declaration which is admissible as accompanying an act, and one admissible merely as secondary evidence; in the former case, the admissibility results immediately from its connection with a fact

¹ Declarations, which form part of the *res gestæ*, which explain and give character to what was done at the time, are not liable to the objection that they are hearsay; *Kirby v. The State*, 7 Yerger, 259; *Evans v. Jones*, 8 Yerger, 461; *Marr v. Hill*, 10 Missouri, 320; *Kinzer v. Mitchell*, 8 Barr, 64; *St. Clair v. Shale*, 9 Barr, 252; *Casky v. Haviland*, 13 Alabama, 314, *Elkins v. Hamilton*, 20 Vermont, 627; *Holbrook v. Murray*, 20 Vermont, 525; *Russell v. Frisbie*, 19 Conn. 205; *Redding v. Spruance*, 4 Harring. 217; *Roulhac v. White*, 9 Iredell, 63; *Biles v. Holmes*, 11 Iredell, 16; *Tomkies v. Reynolds*, 17 Alabama, 109.

When an account is made out by the creditor, and receipted by him, the presumption arises that it was paid by the debtor. If the creditor in the receipt states that he received the money from a third person, it is evidence of that fact against the debtor. So, also, if, at the time, he had verbally admitted or declared such to be the fact, it would be competent testimony against the debtor, as a part of the *res gestæ*; *Harrison v. Harrison*, 9 Alabama, 73.

Next, as to such mediate evidence as is of a *secondary* description.

As information derived through another person is in its own nature inferior in point of certainty to that which is derived immediately from an eye or ear witness,^s so, *even in cases where the party from whom such testimony is derived delivered it [*54

material to the cause, and already in evidence; whilst to warrant the admission of secondary evidence, a foundation must first be laid by proof of extrinsic circumstances, usually unconnected with the cause.

^s The highest degree of certainty of which the mind is capable, with respect to the existence of a particular fact, consists in a knowledge of it derived from actual perception of the fact by the senses; and even this degree of evidence is obviously capable of being strengthened or weakened by particular circumstances. It is seldom, however, that a jury can act upon knowledge of this description; it rarely happens that a fact which can be decided by mere inspection is submitted to their consideration. In some instances, however, an inspection by the jury conduces to their decision; where the question turns upon local situation, a view may be had. So the Judges in cases of mayhem, used to act *super visum vulneris*; so a jury of matrons, upon a plea of pregnancy, inspect the person of the prisoner. The degree of evidence which ranks the second in the scale, consists of information derived, not from actual perception by our senses, but from the relation and information of others who have had the means of acquiring actual knowledge of the facts, and in whose qualifications for acquiring that knowledge and retaining it, and faithfulness in afterwards communicating it, we can place confidence.

Information thus derived is evidently inferior, in point of certainty, to that knowledge which is acquired by means of the senses, since it is one step removed from the highest and most perfect source. The truth of the fact in question depends upon the powers of perception possessed by another; the opportunity afforded him of applying them; his diligence in making that application, the strength of his recollection, and his inclination to speak or to write the truth. It is, however, upon knowledge thus derived that juries must in general act; they must be informed of the *res gestæ* by those who have been eye and ear witnesses of them; their means of knowledge and their faithful communication of it, being guarded by the securest means which the law can devise. A third, and still inferior ground of belief, consists in information which we derive, not immediately from one who has had actual knowledge of the fact by the perception of his senses, but from one who knows nothing more of the fact than that it has been asserted by some other person; this species of evidence, which is generally termed hearsay evidence, is evidently inferior, in point of certainty, to the former, even for the common purposes of daily intercourse in society; for, although the author of the assertion may be known, and his veracity highly appreciated, there is a greater latitude afforded for deception, mistake, and misapprehension, and for defect of memory, and hence a degree of doubt must result, which must evidently be increased in proportion to the number of persons through whom the communication has been transmitted; and, consequently, where the author is unknown, and the number of intermediate parties who have acted in the transmission is also unknown, the knowledge must be vague and uncertain, even as applied to the common affairs of life. But for the purposes of proof in a court of justice, a still stronger reason operates to the

*55] under the sanction of a judicial *oath, and although the party to be affected by it had the opportunity to cross-examine, yet the testimony so given would still be inferior in degree to the direct testimony of the same witness, and consequently such inferior evidence would be excluded by the general principle already adverted to, so long as the original witness could himself be produced.

But in ordinary cases, where the testimony formerly given consists of mere declarations, which rest principally, if not entirely, on the credit of the party who made them, such evidence is of a still weaker and more imperfect description, not being sanctioned by either of the great tests of truth already mentioned. Hence
*56] the general rule of *law is, that such evidence cannot be received except in particular instances where the necessity

rejection of such evidence, namely, that it cannot be subjected to the ordinary tests which the law has provided for the ascertainment of truth, the obligation of an oath, and the opportunity afforded for cross-examination; for these, or equivalent ones, are the guarantees of truth, which the law in ordinary cases invariably requires. In the common course of life, evidence of this nature is frequently, nay usually, acted upon without scruple; but in the ordinary affairs of life there is, in general, no considerable temptation to deceive: on the contrary, a legal investigation of a fact, which involves the highest and dearest interests of the parties concerned—property, character, nay liberty, or life itself—presents the greatest possible temptations to deceive; and therefore that evidence which is admitted before a jury must be guarded by greater restraints and stricter rules than those which are sufficient for the common purposes of life.

Even if it were to be assumed that one who had been long enured to judicial habits might be able to assign to such evidence just so much and no greater credit than it deserved, yet, upon the minds of a jury unskilled in the nature of judicial proofs, evidence of this kind would frequently make an erroneous impression. Being accustomed, in the common concerns of life, to act upon hearsay and report, they would naturally be inclined to give such credit when acting judicially; they would be unable to reduce such evidence to its proper standard, when placed in competition with more certain and satisfactory evidence; they would, in consequence of their previous habits, be apt to forget how little reliance ought to be placed upon evidence which may so easily and securely be fabricated; their minds would be confused and embarrassed by a mass of conflicting testimony; and they would be liable to be prejudiced and biassed by the character of the person from whom the evidence was derived. In addition to this, since every thing would depend upon the character of the party who made the assertion, and the means of knowledge which he possessed, the evidence, if admitted, would require support from proof of the character and respectability of the asserting party; and every question might branch out into an indefinite number of collateral issues. •

Upon these grounds it is that the mere recital of a fact, that is, the mere oral assertion or written entry by an individual that a particular fact is true, cannot be received in evidence. See Gambier on the Study of Moral Evidence.

is urgent, and peculiar considerations sanction a departure from the general rule.

Where a witness to facts might be produced and examined on oath, little doubt could be entertained that hearsay evidence of his mere declaration, heard and detailed by another, ought to be excluded, so infinitely inferior in degree must such hearsay evidence be when compared with direct testimony delivered in open Court.

Immediate testimony is given under the solemn sanction of an oath, in the presence of the public; the jury have the advantage of observing the deportment of the witness, the manner in which he gives his testimony: in particular, whether as one relying on the consistency of truth, he answers promptly and readily according to the suggestions of his memory, or with hesitation and difficulty, either attempting to evade direct answers, or to gain time to weigh them, in order to avoid contradictions and inconsistency; whether he readily answers all questions indifferently, whether they make in favour of or against the party whose witness he is, or he gives favourable answers on the one side with willingness and readiness, on the other with difficulty and reluctance. The attention of such a witness is called directly and immediately to the very facts of which the disclosure is material; his means of knowledge, memory, situation, connection with the parties, and his motives, are subject to the severe and trying test of cross-examination, by means of which fraudulent witnesses are often surprised and detected.

In all these important particulars mediate evidence is usually defective; for although no doubt be entertained that the witness examined heard from another the statement which he is ready to repeat, yet that other did not make the communication under the sanction of an oath; there are no sufficient means of ascertaining whether he had the opportunity or the capacity for minute and accurate* observation, nor of judging as to the tenacity of his memory: his attention in making the communication [*57 may not have been sufficiently directed to many of the particular facts, which afterwards appear to be material; he may have omitted many which are important, or, not knowing that any such use would afterwards be made of his declarations, may have expressed himself without that caution and accuracy which he would have deemed to be necessary had he been examined under the sanction of an oath before a public tribunal, having his attention particu-

larly directed to each material fact, and with a full knowledge of the important consequences which might result from his testimony with respect to the property, liberty, or lives of others, and the necessity for attention and caution in his answers. In addition to this, he may have been induced to misrepresent facts on the particular occasion, under the influence of indirect motives, which, without the opportunity of cross-examination, it is impossible to trace or even to surmise.

Where the communication is derived through several intermediate witnesses, it is still weaker in degree; there is greater latitude afforded for misunderstanding and mistake, or even designed wilful misrepresentation; and it is more difficult to appreciate the veracity of the original witness, the means which he possessed of acquiring information, and the motives by which he was actuated in making the communication. Ordinary experience shows how little credit is due to such mediate testimony, and how frequently it happens that even most absurd and improbable reports acquire credit.

But where such immediate testimony is *unattainable*, and declarations oral or written can be proved to have been made, why, it may be asked, should not these, in default of better evidence, be admitted? as such evidence would, in numerous instances, be sufficient to convince an ordinary individual, why should truth derivable from such evidence be excluded? The answer is, because if such *evi-
*58] dence were *generally* receivable, the uncertainty and confusion which would result from its general reception would far outweigh the benefit which might possibly be derived from its admission in particular instances.

The law for regulating the reception of evidence ought to proceed upon certain grounds, and prescribe plain and determinate limits: if none were to be prescribed, the most serious inconvenience would be experienced in the administration of justice; the trials of causes would be unnecessarily protracted by the admission of unnecessary evidence, and the attention of the jurors would often be distracted from the consideration of that which was material and useful, and applied to that which was unimportant, or even irrelevant: on the other hand, indefinite and obscure boundaries, which occasioned the admission of evidence to be encumbered with doubts and difficulties, would be worse than none.

To take a strong case: suppose that a man, asserting that he is urged by the reproaches of his conscience to confess a crime of great enormity, surrenders himself into the hands of justice, and

that his ample confession involves others as having been his guilty associates; it may easily be supposed that in such a case the apparently sincere penitence of the self-accuser, and the great improbability that such a statement under the circumstances could possibly be founded on any but sincere motives, would strongly tend to induce one who heard the confession, and knew the circumstances under which it was made, to give it credit. This may readily be admitted: the question, however, is not what might happen under special circumstances, but whether they warrant a general rule, and whether a general rule which would include such evidence would not also include a great deal more of a suspicious and unsatisfactory nature. In order to form a conclusion on this subject, all peculiar and adventitious circumstances as to the particular manner, conduct and demeanour of the penitent, his expressions of sorrow and contrition, *must be left out of the account; these are merely adventitious, and are circumstances in themselves too variable [*59 and indefinite to furnish a rule of admission or exclusion. Stripped of such merely casual circumstances as, whatever their influence might be in particular instances, could supply no general and certain rule, the question would be, whether the consideration that the party accusing another avowed his own guilt, to the same or it may be to a less extent, supplied a general sanction for the reception of such evidence. On this question it is difficult to raise a doubt.

To ascertain by what impulses and motives a person so situated might be actuated in making such a statement, is far beyond the power of human wisdom; that he was really the guilty person he avowed himself to be, might indeed be readily inferred, so far as he alone was concerned; but in charging others as his associates, it is far from impossible that he might practice deceit or misrepresentation from sinister motives: it might be in the hope of procuring in his own favour a mitigation of punishment or even a pardon; it might be for the purpose of extenuating his own conduct; or even that he acted from motives of malice and revenge, or for the sake of reward, in a case where security and reward were held out as inducements to a detection, or might expect such a result in the event of the conviction of the party whom he thus charged with being a guilty associate.

To establish, therefore, a general rule, that where a self-accuser at the time of his confession charged another with the commission of the same crime, the confession should be received against the

latter, would be to admit evidence in many cases of too suspicious and dangerous a description to be relied on generally, especially by juries, who would frequently be destitute of those collateral aids which would enable an individual acquainted with all the minute circumstances of the case to form his own judgment, and who for want of such means might frequently *be induced to give

*60] credit to a statement where an individual would have withheld his confidence altogether.

Again, in respect of civil liability, it is very possible that a declaration by *A*, that he was jointly liable with *B* to the payment of a debt or duty, would, under particular circumstances, entitle him to credit; it might be that the very circumstance of his at once admitting his own responsibility would be a sanction for believing that *B* was also liable: but it might also happen that such an admission was but a mere artifice, resorted to for the purpose either of causing another who was not liable to contribute to the payment of *A*'s debt, or even resulted from collusion with one setting up a false claim to defraud *B*.

It is obvious, therefore, that a general rule which admitted the mere statement of one man to be used against another, merely on the ground that such statement was apparently contrary to the interest of him who made it, though it might occasionally tend to the ends of justice, would in other instances be productive of mischief and injustice.

But if the consideration that the statement was apparently contrary to the interest of the party who made it, would not in general warrant its reception, it is plain that the reasons for exclusion would operate still more forcibly to the general exclusion of statements, the reception of which was not sanctioned by some general rule of law. In individual instances, casual and adventitious circumstances, and in particular a full conviction of the veracity and accuracy, as well of the party who made as of the party who communicated the declaration, would be a sufficient ground for belief, on which an individual might safely act; but such special grounds can seldom form the basis of a general rule; and the consideration that a man might in particular instances trust to such evidence, would supply no sufficient reason for the general reception of such evidence before a jury, who would usually be destitute of those peculiar means of judging of the credit due to the evidence by the *aid of which an ordinary individual

*61] would be enabled to decide, and consequently be peculiarly

liable to imposition were such evidence to be generally admissible.

Hence it is that, except in the instances which will presently be noticed, where a rule of exception can be established to the contrary, the law excludes all mediate or hearsay evidence of mere declarations made by others to those who are sworn and examined. In so doing, the truth may sometimes be excluded, but ample compensation is made by the further exclusion of a mass of evidence which would tend to deceive and mislead: the result is, on the whole, greatly on the side of justice: the rule obstructs one source of truth, but it also excludes a flood of error.

Next, then, in what instances, and under what sanction does the law admit secondary mediate evidence?

In the first place, it seems to be a general rule, that where a witness already examined in a judicial proceeding between the same parties is since dead, his former examination is admissible as secondary evidence; for in such case the testimony was given under the obligation of an oath, and the adversary had, or might have had the benefit of a cross-examination.¹

Where, however, the party against whom the evidence is offered had not the opportunity to cross-examine, the deposition or examination is usually inadmissible, at least its admissibility is not warranted by the rule just adverted to. On these grounds it is that the depositions of witnesses taken by magistrates in cases of felony, under the statutes 1 & 2 Ph. & M., c. 13; 2 & 3 Ph. & M., c. 10; and 7 Geo. IV., c. 64, though admissible when taken in the presence of the prisoner, who has thus had the opportunity to cross-examine, have been held to be inadmissible when taken in the absence of the prisoner.^h It is again to be observed, that where a party against whom such evidence is offered had the opportunity to *cross-examine, it is the same thing in effect as if he had availed himself of the opportunity, provided it [*62 was taken in the course of a proceeding to which he was a party, for otherwise he was not bound to pay any attention to it.

The first great class where mediate testimony is receivable as

^h *Vide infra*, tit. DEPOSITIONS; and See Vol. II., tit. DEPOSITIONS.

¹ The rule in this country would seem to be different; *Boudereau et al. v. Montgomery et al.*, 4 Wash. C. C. Rep. 186. But see *Elliott v. Peirsol*, 1 Pet. 337. G.

secondary evidence on special grounds, although the statement was not on oath, and although the adversary had no opportunity to cross-examine, consists of the declarations made by persons, since deceased, on the subject of pedigree, custom, boundary, and the like, where from the nature of the subject-matter of the declarations and situation of the parties it is reasonably to be presumed that they knew the fact.

In the first place, the fact to be proved must be of a public nature; otherwise it is not to be presumed that the individual from whom the tradition was derived had the means of knowledge.

Secondly. As in the case of general reputation, such evidence must, in all cases where any question of public concern is in issue, be confined to general declarations, to the exclusion of mere declarations as to particular facts.

Thirdly. Traditionary evidence as to rights must be derived from those persons who were in a situation to know what the rights were; and in the case of pedigree, declarations are not admissible, unless they be derived from such as were connected with the family.

Fourthly. As evidence of this description partakes of the weakness and infirmities of hearsay report,¹ its credibility depends *63] mainly on the absence of all temptation to misrepresent the facts: it follows that it cannot be trusted, and is inadmissible, under circumstances which were likely to influence and bias those from whom the evidence is derived. Upon this principle it has been held that a declaration relating to a pedigree made *post litem motam*, cannot be received.² But in the case of *Nicholls v.*

¹ Grose, J., in the case of *Morewood v. Wood*, 14 East, 330, states the case of a pedigree which was tried at Winchester, where there was a strong reputation throughout all the country one way, and a great number of persons were examined to it; but after all, the whole was overturned, and proved to have no foundation whatsoever, by the production of a single paper from the Heralds' office: which shows (observed the learned Judge) how cautiously this sort of evidence ought to be admitted. See also Lord Ellenborough's observations, 1 M. & S. 616-7; Eng. C. L. R. 28; where he observes that reputation in general is weak evidence; and of Buller, J., *Morewood v. Wood*, 14 East, 330.

² *Case of the Berkeley Peerage*, 4 Camp. 401; *Sussex Peerage case*, 11 Cl. & F. 85. See the cases below, tit. PEDIGREE; and see *Rex v. Cotton*, 3 Camp. 444, *cor. Dampier*; where, upon an indictment against an occupier of a farm, for not repairing a road *ratione tenuræ*, an award made many years before, when the same subject was in dispute between a former occupier and the township, was rejected as inadmissible, on the ground that the declarations of witnesses, since deceased, made before the arbitrator on that occasion, could not have been

Parker,¹ traditionary evidence of what old persons, then dead, had said concerning the boundaries of the parish and manor (the subject of the action) was admitted in evidence, although the old persons were parishioners, and claimed rights of common on the wastes, which would be enlarged by their several declarations, there not appearing to be any dispute at the time respecting the right of the old persons making the declarations, at least no litigation pending: so that those persons could not be considered as having it in view to make declarations for themselves at the time; although, in fact, the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after such declarations by the respective parties.

Lastly, as in the case of general reputation, such evidence is of little or no weight, unless it be supported and confirmed by evidence of the actual exercise and enjoyment* of the right [¶64 to which such traditionary declaration relates.

In the next place, notwithstanding the general rule, that the mere declarations of a person, as to a particular fact, are not evidence of that fact; and notwithstanding the limitations by which the reception of evidence of reputation and tradition is guarded, particularly those which confine the admission of such evidence to matters of some public nature and interest, and exclude reputation and tradition, which relate merely to particular facts; there are some cases which form exceptions to these rules, and where the privacy of the fact, so far from excluding the hearsay declaration concerning it, seems to induce the necessity of its admission. As far as these are referable to any certain principles (for some of them have been looked upon as mere anomalies and arbitrary exceptions),^m they seem to be confined, for the most part, to instances of facts known only to a few individuals who possessed peculiar means of knowledge, and consequently where, if the declarations of such individuals were not admissible, all evidence on the subject might be excluded. They are divisible into two

received, having been made *post litem motam*, and that the opinion of the arbitrator, founded upon such testimony, could not be entitled to greater credit. It is *vexata quæstio* whether such declarations made *post litem motam* would not be admissible, if it could be shown that the person making them did not know of the existence of any controversy. See *Berkeley Peerage case*, *Monkton v. Attorney-General*, 2 Russ. & M. 147.

¹ 14 East, 331.

^m See Lord Kenyon's observation, 5 T. R. 123.

distinct classes, the one consisting of declarations or entries against the interest^a of the persons making them; the other, of entries made by parties in the usual course^o of their business.

With respect to the first of these classes, the reception of such declaration or entry seems to have been founded upon the presumption that the party would not have made it contrary to his own interest, unless it had been true. *The absence not
*65] merely of any interest is to falsify it, but the circumstance of its being actually adverse to his interest creates the strongest improbability that it is a misrepresentation, and justly, is considered to afford a sufficient guarantee for its accuracy to render it admissible as evidence when the person who made it is no more. Thus, where a deceased steward has admitted by entries in his accounts, the receipt of rents^p, or churchwardens have made similar entries of the receipt of moneys from the inhabitants of a subdivision of the parish, for parochial purposes, such admissions have been held to be evidence of payments for those purposes.^q And upon similar grounds, the declaration of a deceased tenant, that he held the land under a particular person, was held to be admissible to prove the seisin of that person; such a declaration being against his interest, not only because it tended to negative the presumption of his being the freeholder, which his possession would create, but also, since it would have been evidence against him, by the landlord, in an action for use and occupation.^r

The second class of exceptions to the general rule, consists of instances where such evidence derives credit from circumstances, independently of the consideration of an interest to the contrary on the part of the person who made it, viz.: that, it was made by a

^a See the first of these classes fully discussed and explained in *Higham v. Ridgway*, 2 Smith's Leading Cases, 183, and the notes to that case.

^o See this class fully discussed in *Price v. Lord Torrington*, 1 Smith's Leading Cases, 139, and the notes to that case. It seems doubtful whether a declaration made in the usual course of business, though taken down at the time by a third person in such course, would be evidence; see *Brain v. Preece*, 11 M. & W. 773.

^p *Barry v. Bebbington*, 4 T. R. 514.

^q *Stead v. Heaton*, 4 T. R. 669.

^r *Uncle v. Watson*, 4 Taunt. 16. See also *Perigal v. Nicholson*, 1 Wightw. 63. See also *Higham v. Ridgway*, 10 East, 109; 2 Smith's Lead. Cases, 183; where it was held that an entry made by a deceased man-midwife that he had delivered a woman of a child on a particular day, and referring to his ledger, in which the charge for his attendance was marked *paid*, was evidence on the trial of an issue as to the age of the child.

party in the usual course of his profession, trade or business. An entry so made obviously derives its claim to credit from a consideration of the great improbability that such a person would, without any assignable motive, wantonly make an entry of a false fact. The bare possibility of the casual *fabrication of a false entry, made for the purpose of future evidence, could have [66 little weight when compared with the importance of the object to be ultimately attained. In such cases, therefore, no distinction can be made on the supposition or probability of fraud, in the one case, rather than the other: it must, to prevail, depend on the position, that where the entry contains no acknowledgment against the interest of the vouchee, there exists a greater probability that it was wantonly, carelessly, or mistakenly made; this, however, must depend on the circumstances under which it was made; if it was a written entry made in the usual course of a man's profession or trade, in the absence of fraud, it carries with it a reasonable degree of probability that it was made according to the truth.

As the exact rules by which the reception of these two classes of evidence is governed can only be thoroughly explained by reference to the decisions on the subject they will be detailed at a future opportunity; for the present it will suffice to make a few observations on the general principle which ought to regulate the admissibility of such evidence.

In the first place, as such evidence is in general excluded on the grounds already adverted to, it is essential that some special necessity should exist in the particular class of cases for deviating from the general rule, and that it should never be resorted to, until the higher degree of evidence which the party himself might have given be shown to be no longer attainable in consequence of his death.

And even then, in order to warrant the reception of such secondary evidence, it is essential that circumstances should exist which afford a reasonable presumption that the person who spoke or wrote that which is offered in evidence had means of knowing the fact, and that he was not likely to have misrepresented it.

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*CHAPTER IV.

INDIRECT EVIDENCE.

NEXT, as to the admission of indirect evidence.

Having now briefly noticed the general principles which govern the reception of direct evidence to prove a disputed fact by the aid of testimony, whether immediate or mediate, we are next to consider those which govern the admission of indirect evidence: that is, of facts collateral to the disputed fact, but from the existence of which the truth of the fact in dispute may be inferred.

The necessity for resorting to indirect or circumstantial evidence is manifest. It very frequently happens that no direct and positive testimony can be procured; and often, where it can be had, it is necessary to try its accuracy and weight by comparing it with the surrounding circumstances.

The want of written documents, the treachery and fallaciousness of the human memory, the great temptations which perpetually occur to exclude the truth, by the suppression of evidence, or the fabrication of false testimony, render it necessary to call in aid every means of ascertaining the truth upon which the law can safely rely.

Where direct evidence of the fact in dispute is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. It is possible that some circumstances may be misrepresented, or acted with a view to deceive; but the whole context of circumstances cannot be fabricated; the false invention must have its boundaries, where it may be compared with the truth: and, therefore, the more extensive the
 68] view of the jury is of all the minute circumstances of the transaction, the more likely will they be to arrive at a true conclusion. Truth is necessarily consistent with itself; in other words, all facts which really did happen, did actually consist and agree with each other. If then the circumstances of the case, as detailed in evidence, are incongruous and inconsistent, that inconsistency must have arisen either from mistake, from wilful misrepresentation, or from the correct representation of facts prepared and acted with a view to deceive. From whatever source the inconsistency may arise, it is easy to see that the greater the number of circumstances which are exhibited to the jury, the more likely

will it be that the truth will prevail: since the stronger and more numerous will be the circumstances on the side of truth. It will be supported by facts, the effect of which no human sagacity could have foreseen, and which are therefore beyond the reach of suspicion: whilst, on the other hand, fraudulent evidence must necessarily be either confined to a few facts, or be open to detection, by affording many opportunities of comparing it with that which is known to be true. Fabricated facts must, in their very nature, be such as are likely to become material. Hence it has frequently been said, that a well-supported and consistent body of circumstantial evidence is sometimes stronger than even direct evidence of a fact; that is, the degree of uncertainty which arises from a doubt as to the credibility of direct witnesses, may exceed that which arises upon the question whether a proper inference has been made from facts well ascertained. A witness may have been suborned to give a false account of a transaction to which he alone was privy, and the whole rests upon the degree of credit to be attached to the veracity of the individual; but where a great number of independent facts conspire to the same conclusion, and are supported by many unconnected witnesses, the degree of credibility to be attached to the evidence increases in a very high proportion, arising from the improbability that all those witnesses should be mistaken *or perjured, and that all the circumstances should have happened contrary to the usual and [*69 ordinary course of human affairs. The consideration, however, of the credit due to circumstantial evidence, belongs to another place;* at present, the subject is mentioned merely with a view to illustrate the necessity of opening to a jury the most ample view of all the facts which belong to the disputed transactions; leaving the consideration of the importance due to such evidence to be examined hereafter.

Agreeably to this notion and according to the simplicity of the ancient law, it was provided that every trial should be had before a jury who lived so near to the scene of the disputed transaction that they might reasonably be supposed to possess actual and personal knowledge of the circumstances, to have heard and seen what was done. Later experience has shown that a knowledge of the facts to be tried, such as a residence in the neighbourhood supplies, affords but an imperfect and dubious light for the

* *Vide infra*, tit. CIRCUMSTANTIAL EVIDENCE.

investigation of truth; and that justice suffers more from the prejudices and false notions of the facts which a residence in the neighbourhood usually affords, than it gains in point of certainty from a previous knowledge, on the part of the jury, of the parties or of the circumstances of the case. At this day, therefore, it is no longer necessary, either in civil or in criminal cases, that the jury should be returned from the vicinage; they are taken without distinction from the body of the county at large; and being in general strangers to the litigant parties and to the facts in dispute, may be presumed to discharge their important duties without partiality or prejudice. Still, however, the end to be attained is the same, although the means of attaining it are different; it is still the great object of the law that the jury should be fully possessed of
 *70] all the facts and circumstances of the case; and as they have
 *not been actually witnesses of the transaction, either in fact or in contemplation of law, the scene is to be exhibited to them by the only means of recalling a past transaction, that is, by oral evidence and written documents, and the jury are to collect the facts by the senses and perceptions of others, to whose account credit is due.

In consequence, too, of the frequent failure of direct and positive evidence, recourse must be had to presumptions and inferences from facts and circumstances which are known, and which serve as indications, more or less certain, of those which are disputed and contested. It is consequently a matter of the highest importance to consider the grounds, nature and force of such indirect evidence; and to enquire what facts, either singly or collectively, are capable of supplying such inferences as can safely be acted upon.^b

Presumptions, and strong ones, are continually founded upon knowledge of the human character, and of the motives, passions, and feelings, by which the mind is usually influenced. Experience and observation show that the conduct of mankind is governed by general laws, which operate, under similar circumstances, with almost as much regularity and uniformity as the mechanical laws of nature themselves. The effect of particular motives upon human conduct is the subject of every man's observation and experience, to a greater or less extent; and in proportion to his attention, means of observation, and acuteness, every one becomes a judge of the human character, and can conjecture on the one hand, what would be the effect and influence of motives upon any

^b See Vol. II., tit. PRESUMPTIONS.

individual under particular circumstances, and on the other hand, is able to presume and infer the motive by which an agent was actuated, from the particular course of conduct which he adopted. Upon this ground it is that evidence is daily *adduced in courts of justice of the particular motives by which a party [*71 was influenced, in order that the jury may infer what his conduct was under those circumstances; and on the other hand, juries are as frequently called upon to infer what a man's motives and intentions have been, from his conduct and his acts. All this is done, because every man is presumed to possess a knowledge of the connection between motives and conduct, intention and acts, which he has acquired from experience, and to be able to presume and infer the one from the other.

The presumption of conduct, or of any particular act, from the motives by which the supposed agent was known to be influenced, is more or less cogent as the motive itself was stronger or weaker, and as experience has proved it to be more or less efficacious in affecting a man's conduct. The presumption of particular intention, from a man's acts and conduct, is more or less forcible, according to their nature, and their greater or less tendency to effect the supposed intention, and the improbability, derived from experience, that they could have resulted from any other motive, or have been done with any other intention. Presumptions of this nature are of most essential importance in criminal cases. Where a heinous crime has been committed, as, for instance, murder by means of poison, and where it is obvious that theft was not the object of the guilty party, it is essential to inquire whether the accused was influenced by any motive to commit such an offence; the absence of all motive, whether of avarice or revenge, affords a strong presumption of innocence, where the fact is in other respects doubtful, because experience of human nature shows that men do not commit mischief wantonly and gratuitously, without any prospect of advantage; still less do they perpetrate enormous crimes, and subject themselves to the severest penalties of the law, without the strongest motives: when, on the contrary, other strong presumptions appear against the accused, the knowledge that he was influenced by a very strong motive *to commit such a crime, must of necessity greatly add to the [*72 probability of his guilt.

In criminal cases a question usually arises as to the intention of the accused, since it is, in general, the guilty intention with which

an act is done that renders it criminal; and in numerous instances a particular intention is made an essential ingredient in the statutory offence. But intention, which is the mere internal and invisible act or resolve of the mind, cannot be judged of except from external and visible acts; and in all such cases, and many others, a man's object and motives must be inferred from his *conduct*; and what particular acts and conduct are sufficient to indicate the guilty intention which is imputed to the accused, is a question of fact to be decided by those who are conversant in human affairs, and whose experience enables them to judge of the connection between conduct and intention.

In many of the common concerns of life a man may act from a complication of motives which human sagacity cannot unravel; the secret workings of which Omniscience alone can understand; but in the case of a crime defined by the law, and where, consequently, both the act itself and the intention are simple and definite, so much difficulty does not prevail in the ascertainment of intention; in such instances it is reasonable to infer, that a man intended and contemplated that end and result which is the natural and immediate consequence of the means used by him; and this is the ordinary presumption of law. In criminal proceedings, the consideration of the *conduct* of the accused will, in other respects, be found to be of great importance in determining upon his guilt or innocence, where there is either no direct evidence of the fact, or such as cannot standing alone be safely relied upon.

The *conduct* which may afford an inference in such a case, may consist either in the seeking opportunities and means for committing such an act, or in attempting to avoid suspicion or injury by flight, or in concealing *evidence of guilt, or even in *73] showing an anxiety to do so; for it is certain that the guilty person must have had the opportunity and means of committing the offence; and it is probable that he would previously watch for such an opportunity, and he must have procured the means. Again, it is also probable that the guilty person, goaded by the stings of conscience, or at least actuated by fear of detection and of punishment, would use every effort within his power to avoid suspicion, or at least inquiry; and experience fully proves that means, in the hour of terror and alarm, are often resorted to by the guilty, in the hope of providing security, which, so far from preventing or lulling suspicion, provoke and excite it, and turn out to be forcible evidence of guilt. Flight; the fabrication of

false and contradictory accounts, for the sake of diverting inquiry; the concealment of the instruments of violence; the destruction or removal of proofs tending either to show that an offence has been committed, or to ascertain the offender, are circumstances indicative of guilt, since they are acts to which *some* motive is attributable, and are such as are not likely to have been adopted by an innocent man; but such, on the contrary, as according to experience are usually resorted to by the guilty. A full *confession*^c of guilt, although it be but presumptive evidence, is one of the surest proofs of guilt, because it rests upon the strong presumption that no innocent man would sacrifice his life, liberty, or even his reputation, by a declaration of that which was untrue. The presumption immediately ceases as soon as it appears that the supposed confession was made under the influence of threats or of promises, which render it uncertain whether the admissions of the accused resulted from a consciousness of guilt, or were wrung from a timid and apprehensive mind, deluded by promises of safety, or subdued by threats of violence or punishment. It may be proper also to remark in this place, that some of those presumptions which have lately been touched *upon are to be regarded with great caution; for it sometimes happens that an innocent, but weak and injudicious person, will take very undue means for his security, when suspected of a crime. A strong illustration of this is afforded by the case of the uncle, mentioned by Lord Hale. His niece had been heard to cry out, "Good uncle, do not kill me!" and soon afterwards disappeared; and he being suspected of having destroyed her, for the sake of her property, was required to produce her before the justice of assize: he being unable to do this, (for she had absconded,) but hoping to avert suspicion, procured another girl resembling his niece, and attempted to pass her off as such. The fraud was, however, detected; and, together with other circumstances, appeared so strongly to indicate the guilt of the uncle, that he was convicted and executed for the supposed murder of the niece, who, as it afterwards turned out, was still living.

In civil cases also, the most important presumptions (as will be afterwards more fully seen) are continually founded upon the conduct of the parties: if, for instance, a man suffer a great *length of time* to elapse without asserting the claim which he at last makes, a presumption arises, either that no real claim ever existed, or

^c See tit. ADMISSION—CONFESSION.

that, if it ever did exist, it has since been satisfied;^d because, in the ordinary course of human affairs, it is not usual to allow real and well-founded claims to lie dormant. So the uninterrupted enjoyment of property or privileges for a long space of time raises a presumption of a legal right; for otherwise it is probable that the enjoyment would not have been acquiesced in.^e Upon the presumption that after a lapse of six years a debt on simple contract has been satisfied, the Legislature seems to have founded *75] the *provision in the Statute of Limitation; a presumption liable to be rebutted by proof of a promise to pay the debt, or an acknowledgment that it still remains due, made within the six years.^f

The *conduct* of a party in omitting to produce that evidence, in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him; since it raises a strong suspicion that such evidence, if adduced, would operate to his prejudice. So forcible is the nature of this presumption, that the law founds upon it a most important elementary rule, which excludes secondary evidence where evidence of a higher degree might have been adduced; and this it does, because it is probable that a party who withholds the best and most satisfactory evidence from the consideration of the jury, and attempts to substitute other and inferior evidence for it, does so because he knows that the better evidence would not serve his purpose.^g

Upon the same principle, juries are called upon to raise an inference in favour of a defendant in a criminal case from the goodness of his character in society; a presumption too remote to weigh against evidence which is in itself satisfactory, and which ought never to have any weight except in a doubtful case.^h

^d See Vol. II., tit. PRESUMPTIONS—LIMITATIONS—PRESCRIPTION.

^e Where a party neglects to take out execution within a year after his judgment, he must, in general, revive it by *scire facias* before he can proceed to execution; and this is founded upon a presumption that the debt or damages have in the mean time been paid.

^f See tit. LIMITATIONS. Such a promise, to be available, must now be in writing.

^g *Vide infra*, tit. BEST EVIDENCE.

^h See tit. CHARACTER. It seems to be the last remnant of compurgation.

ⁱ Evidence of the general character of the defendant is admissible in his favour in a criminal prosecution; but it is entitled to little weight, unless when the fact

Upon similar grounds, presumptions may be derived from the artificial course and order of human affairs and dealings, wherever any such course and order exist; because, in the absence of any reason to suppose the contrary, a probability arises that the usual course of dealing has been adopted. Hence presumptions are founded upon the course of trade, the course of the post, the customs of a particular trade, or of a particular class of people, and *even the course of conducting business in the concerns of a private individual, to prove a particular act done in the [*76 usual routine of business.¹

¹ See *Lord Torrington's Case*, 1 Salk. 285; 1 Smith's Leading Cases, 139.

is doubtful or the testimony merely presumptive; *The State v. Wells*, Coxe, 424; *United States v. Rouderbush*, 1 Baldw. 514; *Bennet v. The State*, 8 Humph. 118; *Commonwealth v. Webster*, 5 Cushing, 295; *Ackley v. The People*, 9 Barb. S. C. Rep. 609; *Schaller v. The State*, 14 Missouri, 502.

But evidence of bad character is not admissible against him, unless in rebuttal of testimony adduced by him; *People v. White*, 14 Wendell, 111.

And when such rebutting evidence is allowed, the witnesses must be confined to the defendant's character before he was accused of the crime in question; *Martin v. Simpson*, 4 McCord, 262.

In civil cases evidence of the general character of a party is admissible only when it is put in issue, by the pleadings; *Anderson v. Long*, 10 Serg. & Rawle, 55; *Atkinson v. Graham*, 5 Watts, 411; *Fowler v. Aetna Ins. Co.*, 6 Cowen, 673; *Potter v. Webb*, 6 Greenl. 14; *Humphrey v. Humphrey*, 7 Conn. 116; *Gough v. St. John*, 16 Wend. 646; *Ward v. Herndon*, 5 Porter, 352; *Senets v. Plunket*, 1 Strobhart, 372; *Thayer v. Boyle*, 30 Maine, 475; *McKinney v. Rhoad*, 5 Watts, 343; *Nash v. Gilkeson*, 5 Serg. & Rawle, 352.

After an attempt to assail the character of a plaintiff in an action of slander he may prove his good character, that being an action in which character is put in issue, being part of the allegation of the narr; *Holley v. Burgess*, 9 Alab. 728; *Winebiddle v. Porterfield*, 9 Barr, 137; *Petrie v. Rose*, 1 Watts & Serg. 364.

¹ "I am myself," says Story, J., "no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade, to control, vary or annul the general liabilities of parties, under the common law as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find that of late years the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from new implications and presumptions and acts of a doubtful or equivocal char-

In all such cases the course of dealing may be proved before the jury, and is evidence in matters connected with it. The usual time of credit in a particular trade is evidence to show that goods were sold at that credit; the course of the post is evidence to show that a particular letter, proved to have been put into the post-office, was received in the usual time by the party to whom it was directed. The ground of presumption in this and a multitude of similar instances is, that where a regular course of dealing has once been established, that which has usually happened did happen in the particular instance; and such presumptions, like all others, ought to prevail, unless the contrary be proved, or at least be encountered by an opposite presumption.

Where a fact or relation is in its nature continuous, after its existence has once been proved, a presumption arises as to its continuance at a subsequent time: for, from the nature of the fact or relation, a very strong presumption arises that it did not cease immediately after the time when it was proved to exist, and, as there is no particular time when the presumption ceases, that it still continues; therefore, where a *partnership* between two persons has once been established, its continuance at a later period is to be

acter. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract and *a fortiori*, not in order to contradict them;" *The Schooner v. Reeside*, 2 Sumner, 569; *Macomber v. Parker*, 13 Pick. 182; *Lawrence v. McGregor*, 5 Ham. 311; *Sampson v. Gazzam*, 6 Porter, 123; *Cooper v. Kane*, 19 Wend. 386; *Hone v. Mutual Safety Ins. Co.*, 1 Sanf. Sup. Ct. 137.

A person who makes a contract is not bound by the usage of a particular business, unless it is so general as to furnish a presumption of knowledge or it is proved that he knew it; *Stevens v. Reeves*, 9 Pick. 198; *Wood v. Hickok*, 2 Wend. 501; *The Paragon*, Ware, 322; *Winsor v. Dillaway*, 4 Metc. 221; *Steamboat Albatross v. Wayne*, 16 Ohio, 513; *Nichols v. De Wolf*, 1 Rhode Island, 147. Witnesses may be examined to prove the course of a particular trade but not to show what the law of that trade is; *Ruan v. Garden*, 1 Wash. C. C. Rep. 145; *Winthrop v. Union Ins. Co.*, 2 Ibid. 7; *Austin v. Taylor*, 2 Ham. 64.

A usage of an individual, which is known to the person who deals with him, may be given in evidence as tending to prove what was the contract between them; *Loring v. Gurney*, 5 Pick. 15; *Naylor v. Semmes*, 4 Gill. & Johns. 274; *Searson v. Heyward*, 1 Speers, 249; *Berkshire Woollen Co. v. Porter*, 7 Cash, 417; *Adams v. Otterback*, 15 Howard, S. C. R. 539.

presumed, unless the termination be proved.^k So, where the existence of a particular individual has once been shown, it will, within certain limits, be presumed that he still lives.¹ The presumption as to a man's life after a number of years must depend upon many circumstances; his habits of life, his age, and constitution: the probable duration of the life of a person, as calculated upon an average, may of course be easily ascertained in every particular case: but for the sake of *practical convenience, the law lays down a rule in some instances, which appears to have been [77 very generally adopted, that after a person has gone abroad, and has not been heard of for seven years, it is to be presumed that he is dead.¹² The various instances in which facts not in issue may

^k See tit. PARTNERSHIP.

¹ *Doe dem. Knight v. Nepean*, 5 B. & Ad. 86; E. C. L. R. 27; 2 M. & W. 894. See tit. POLYGAMY—EJECTMENT BY HEIR-AT-LAW—DEATH.

¹ *Innis v. Campbell*, 1 Rawle, 373; *Smith v. Knowlton*, 11 N. Hamp. 91. So that possession continues; *Bayard's Lessee v. Colfox*, 4 Wash. C. C. Rep. 38, that a corporation continues to exist; *People v. Manhattan Co.*, 9 Wend. 351; even that a wrong continues as a trespass or entry and ouster; *Lewis v. Paine*, 4 Wend. 423; *Jackson, ex dem. Miller v. Porter*, 4 Wend. 672. A state of peace is to be presumed by courts until the national power of the country sits declares to the contrary; *The People v. McLeod*, 1 Hill, 377. If a vessel is seaworthy when the policy attaches, it will be presumed that she continues so during the time of the risk, unless it otherwise is shown in proof; *Martin v. Fishing Ins. Co.*, 20 Pick. 389. So the law presumes the residence of a person to continue in a place where it is shown to have been at any time, until the contrary is shown; *Prather v. Palmer*, 4 Pike, 456; *Cawdill v. Thorp*, 1 Iowa, 158. A person proved to have been insane at any time is presumed to remain so, until the contrary is proved; *Sprague v. Duel*, 1 Clark, 90; *Thornton v. Appleton*, 29 Maine, 298.

² *Wambaugh v. Schank*, 1 Pennington, 229; *Newman v. Jenkins*, 10 Pick. 515; *Woods v. Wood's Admr.* 2 Bay, 476; *Spurr v. Fimble*, 1 Marsh. 278; *Hull v. Commonwealth*, Hardin, 479; *Innis v. Campbell*, 1 Rawle, 373; *Burr v. Sims*, 4 Whart. 150; *Bradley v. Bradley*, Ibid. 173; *Loring v. Steinman*, 1 Metc. 204; *Forsaith v. Clark*, 1 Foster, 409; *Primm v. Stewart*, 7 Texas, 178.

When a person has not been heard from in seven years, and when last heard from, he was beyond sea, without having any known residence abroad, the legal presumption is, that he is dead; but there is no presumption that he died at any particular time, or even on the last day of the seven years; *McCarter v. Camel*, 1 Barb. Ch. Rep. 455. The death is generally presumed to have occurred at the expiration of the time; *Smith v. Knowlton*, 11 N. Hamp. 191; *Burr v. Sims*, 4 Wharton, 150; *Bradley v. Bradley*, Ibid. 173; but not in all cases; *The State v. Moore*, 11 Iredell, 160.

Although mere absence of a person from his place of residence does not raise a presumption of his death, until after the lapse of seven years without his being heard from, yet his absence for a much less space of time without his being heard

properly be admitted in evidence, in order to prove some other fact by inference from them, are far too numerous to be detailed on this occasion. Some of them will be more properly adverted to in considering the evidence peculiar to the proof of particular issues;^m suffice it to observe at present, that the admissibility of such evidence always depends on some natural or artificial connection between that which is offered to be proved and that which is proposed to be inferred.

In general, all the affairs and transactions of mankind are as much connected together in one uniform and consistent whole, without chasm or interruption, and with as much mutual dependence on each other, as the phenomena of nature are; they are governed by general laws; all the links stand in the mutual relations of cause and effect; there is no incident or result which exists independently of a number of other circumstances concurring and tending to its existence, and these in their turn are equally dependent upon and connected with a multitude of others. For the truth of this position the common experience of every man may be appealed to; he may be asked, whether he knows of any circumstance or event which has not followed as the natural consequence of a number of others *tending to produce it, and which has *78] not in its turn tended to the existence of a train of dependent circumstances. Events the most unexpected and unforeseen are so considered merely from ignorance of the causes which were secretly at work to produce them; could the mechanical and moral

^m Connections frequently consist in similarity of custom or tenure, see *tit. COPY-HOLD—CUSTOM*; or in unity of design or purpose, see *CONSPIRACY*. Thus in order to show the necessity of calling in the aid of the military to execute process, proof of acts of violence by the mob collected in another quarter, but collected for the same purpose as those about the plaintiff's house, is admissible. *Burdett v. Colman*, 14 East, 183.

from, in connection with other circumstances, will raise such presumption; *White v. Mann*, 26 Maine, 361.

Where a demandant claimed under one of six children of the former owner of the land, evidence that inquiries had been made in regard to the other five children and that nothing had been heard of them for seventy years, was held sufficient to justify a jury in finding that they had died without issue; *King v. Fowler*, 11 Pick. 302; so after forty-eight years; *Allen v. Lyons*, 2 Wash. C. C. Rep. 475; so after twenty-two years; *McComb v. Wright*, 5 John. Ch. Rep. 263. It is not to be inferred however negatively from these cases, that the ordinary period for raising the presumption of death is not also sufficient to raise the presumption of death without issue: if the party was without issue when last heard from, or if the issue has also been unheard from for seven years.

causes which gave rise to them have been seen and understood, the consequences themselves would not have created surprise.

It is from attentive observation and experience of the mutual connection between different facts and circumstances, that the force of such presumptions is derived: for where it is known from experience that a number of facts and circumstances are necessarily, or are uniformly or usually connected with the fact in question, and such facts and circumstances are known to exist, a presumption that the fact is true arises, which is stronger or weaker as experience and observation show that its connection with the ascertained facts is constant, or is more or less frequent.

The presumptions or inferences above alluded to are chiefly those which are deducible by virtue of mere antecedent experience of the ordinary connection between the known and the presumed facts;^a but circumstantial or presumptive evidence in general embraces a far wider scope, and includes all evidence which is of an indirect nature, whether the presumption or inference be drawn by virtue of previous experience of the connection between the known and the inferred facts,^o or be a conclusion of reason from the circumstances of the particular case, or be the result of reason aided by experience.

From what has been said, it seems to follow that all the surrounding facts of a transaction, or as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, sanctioned by the law, and afford any fair presumption or inference *as to the question in dispute; for, as has already been observed, so frequent is the failure [*79 of evidence, from accident or design, and so great is the temptation to the concealment of truth and misrepresentation of facts, that no competent means of ascertaining the truth can or ought to be neglected by which an individual would be governed, and on which he would act, with a view to his own concerns in ordinary life. Let it be considered, then, *first*, what is the kind of evidence to which he would naturally resort; and in the next place, how far the law interferes to limit and restrain the reception of such evidence; remembering, at the same time, that all *artificial* and purely *conventional modes of evidence* form a subject for future consideration.

^a See tit. CIRCUMSTANTIAL EVIDENCE.

^o See tit. CIRCUMSTANTIAL EVIDENCE; Vol. II., tit. PRESUMPTIONS, 3 Bla. Comm. 371; Gilb. L. Ev. 160.

Where an ordinary inquirer could not obtain information from any witness of the fact which he was anxious to ascertain, either immediately from such witness, or mediately through others, or where the information which he had obtained was not satisfactory, his attention would be directed to the circumstances which had a connection with the transaction, as ascertained either by his own observation, or by means of the information of others, to enable him to draw his own conclusions; and in pursuing such an inquiry, where it was a matter of importance and interest, he would neglect no circumstances which were in any way connected with the transaction, which could, either singly or collectively, enable him to draw any reasonable inference on the subject. All his experience of human conduct, of the motives by which such conduct was likely to be influenced under particular circumstances, of the ordinary usages, habits and course of dealing among particular classes of society, or in particular transactions, even his scientific skill in medicine, surgery or chemistry, abstract probabilities or natural philosophy, might be called into action, to enable him, by a general and comprehensive view of all the circumstances, and their mutual relations to each other, to draw such a conclusion as reason, aided by experience, would warrant.

*There is, in truth, no connection or relation, whether it
 *80] be natural or artificial, which may not afford the means of inferring a fact previously unknown, from one or others which are known.

Where the connection between facts is so constant and uniform that from the existence of the one that of the other may be immediately inferred, either with certainty, or with a greater or less degree of probability, the inference is properly termed a presumption,^p in contradistinction to a conclusion derived from circumstances by the united aid of experience and reason.

Circumstantial proof is supplied by evidence of circumstances,

^p Such inferences are wholly independent of any actual knowledge of the necessity of the connection between the known and unknown facts. Many of the presumptions which we have to deal with, as connected with the present subject, are legal presumptions, where the law itself establishes a connection or relation between particular facts or predicaments; as that the heir to a real estate was seised, or that a bill of exchange was founded on a good consideration. These, however, will be a subject for consideration when inquiry is made with respect to the artificial effect annexed by the law to particular evidence; for such presumptions are of an artificial and technical nature, whilst those at present considered are merely natural.

the effect of which is to exclude any other supposition than that the fact to be proved is true.

The nature and force of such proof will be more properly considered at another opportunity. The mere question at present is how far the law interferes to limit and restrain the admission of evidence of collateral circumstances tending to the proof of a disputed fact.

In the first place, as the very foundation of indirect proof is the establishment of one or more or other facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, in the same manner as if they were the very facts in issue.

The next question then is, what limit is there to the admission of collateral evidence for the purpose of indirect proof.

*The nature of the evidence, and the principles by which it is to be appreciated, are, as has already been observed, to a [81 great extent common to judicial and extrajudicial inquiries. Its force and efficacy, in the one case as well as in the other, must necessarily depend either on the known and ordinary connection between the facts proved and the facts disputed, or on the force and tendency of the facts proved to establish the truth of the disputed fact or issue by excluding any other supposition.

Great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. The law interferes to exclude all evidence which falls within the description of "*res inter alios acta*;" the effect of which is, as will presently be seen, to prevent a litigant party from being concluded, or even affected, by the evidence, acts, conduct or declarations of strangers. And this rule is to be regarded, to a great extent at least, not so much as a limitation and restraint of the natural effect of such collateral evidence, but as a restraint limited by, and co-extensive with the very principle by which the reception of such evidence is warranted; for the ground of receiving such evidence is the connection between the facts proved and the facts disputed; and there is no such general connection between the acts, conduct and declarations of strangers, as can afford a fair and reasonable inference to be acted on generally even in the ordinary concerns of life, still less can they supply such as ought to be relied on for the purpose of judicial investigation. And therefore this

extensive branch of the rule which rejects the *res inter alios acta*, may be considered as founded on principles of natural reason and justice, the same with those which warrant the reception of indirect evidence.

In the first place, the mere declarations of strangers are inadmissible, except in the instances already considered, *where, on
*82] particular grounds, and under special and peculiar sanctions, they are admissible as direct evidence of a fact. Declarations so circumstanced may be used either for the purpose of directly establishing the principal fact in dispute, or for the purpose of proving the existence of collateral facts from which the principal fact may be inferred; but other declarations, which are of too vague and suspicious an origin to be received as evidence of the facts declared, must also, on the same principle, be rejected as indirect evidence. If such declarations as to the principal fact be inadmissible, they must also be at least equally inadmissible to establish any collateral fact, by the aid of which the principal fact may be indirectly inferred. It would be inconsistent to reject them when offered as direct testimony, but to receive them as collateral evidence, the more especially as even immediate testimony is in one sense but presumptive evidence of the truth; for it is on the presumption of human veracity, confirmed by the usual legal tests, that credit is usually given to human testimony.

If, for example, the question were whether *A* had waylaid and wounded *B*, if the declaration of a third person, not examined on the trial, that he saw the very fact, could not be received in evidence, neither, on any consistent principle, could his declaration that he saw *A* near the place, armed with a weapon, be received in order to establish that fact as one of several constituting a body of circumstantial evidence. For circumstantial proof rests wholly on the effect of established facts, and cannot, therefore, be properly founded wholly or in part on mere declarations, which are of no intrinsic weight to prove any facts.^a

Neither, in general, ought any inference or presumption to the
*83] prejudice of a party to be drawn from the mere *acts or conduct of a stranger; for such acts and conduct are but in the nature of declarations or admissions, frequently not so strong; and such declarations are inadmissible, for the reasons already stated:

^a This observation of course does not extend to any case where the mere fact of such a declaration having been made is in itself material; any such declaration is of itself a fact.

An admission by a stranger cannot be received as evidence against any party; for it may have been made, not because the fact admitted was true, but from motives and under circumstances entirely collateral, or even collusively, and for the very purpose of being offered in evidence. On a principle of good faith and mutual convenience, a man's own acts are binding upon himself,^r and his acts conduct and declarations are evidence against him; but it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorized strangers. But if a party ought not to be bound by the acts of strangers, neither ought their acts or conduct to be used as evidence against him for the purpose of concluding him; for this would be equally objectionable in principle, and more dangerous in effect, than the other. It is true, that in the course of the affairs of life a man may frequently place reliance on inferences from the conduct of others. If, for instance, *A* and *B* were each of them insurers against the same risk, *A* to a large, and *B* to a small amount, it is very possible that, on a claim made against each for a loss, which was admitted and paid by *A* to the extent of his liability, *B*, trusting to the knowledge and prudence of *A*, might reasonably infer that the loss insured against had occurred, and that he also was bound to pay his proportion. It is plain, however, that such an inference would rest on the special and peculiar circumstances of the case; and that, so far from warranting the general admission of such evidence by inference on a legal trial to ascertain the fact, it would supply no general rule, but must be regarded as an exception, even in the ordinary course of business.

*In addition to this, it is obvious that whilst an individual might with discretion rely on the conduct of others, where, [*84 under the peculiar circumstances, there was no reason for suspicion (in which case a principle of self-interest would usually secure the exercise of a sound discretion,) such inferences could not be safely left to a jury, who could not possibly be put in possession of all the collateral reasons by which an individual might properly be influenced in trusting to such evidence, and, which is more material, could not act on those collateral circumstances of suspicion which would have induced an individual to withhold his confidence.

An act done by another, from which any inference is to be drawn as to his knowledge of any bygone fact, is an acted declaration of

^r See Vol. II., tit. ADMISSIONS.

the fact, and is not in general evidence of the fact, because there is no sufficient test for presuming either that he knew the fact, or that, knowing the fact, his conduct was so governed by that knowledge as to afford evidence of the fact which ought to be relied on. A man may frequently act upon very uncertain evidence of a fact; he may have been deceived by others; and even where he has certain knowledge, his conduct may frequently be governed by motives independent of the truth, or even in opposition to it.

Where a party professes to act on his knowledge of the truth of a particular fact, so that his so acting is accompanied by, or is equivalent to a direct or express declaration of the truth of that fact, the question of admissibility falls under principles already considered. A test is necessary to show, first, that he had competent knowledge of the fact; secondly, that he faithfully communicated what he knew.

The rule, therefore, in the absence of special tests of truth, operates to the exclusion of all the acts or declarations or conduct of others, as evidence to bind a party, either directly or by inference; and, in general, no declaration, or written entry, or even affidavit made by a *stranger, is evidence against any man.*¹
 *85] Neither can any one be affected, still less concluded, by any evidence, decree, or judgment, to which he was not actually or in consideration of law privy.

As this is a rule which rests on the clearest principles of reason and natural justice, it has ever been regarded as sacred and inviolable.

The importance of the principle, and the extent of its operation, make it desirable to ascertain its limits, by inquiring negatively what it does not exclude.

In the first place, then, it is scarcely necessary to observe, that a man's own acts, conduct and declarations where voluntary, are always admissible in evidence against him. As against himself, it is fair to presume that his words and actions correspond with the

* For illustrations of this general principle, *vide infra*, tit. DEPOSITIONS—JUDGMENTS—EXAMINATIONS.

¹ Where the defendant, being sued for a debt, set up in defence, that by a new contract with him, the plaintiff accepted a third person as his debtor in place of the defendant, an indorsement of the amount of the debt, made without the privity of the plaintiff, on a note held by the defendant against such third person, is not admissible to prove such new contract, being *res inter alios acta*; *Jacobs v. Putnam*, 4 Pick. Rep. 108.

truth: it is his own fault if they do not. In many instances he is conclusively bound, more especially where he has formally engaged to be so bound; in others, his declarations or acts furnish mere *prima facie* presumptions against him. The rule, therefore, above adverted to, never excludes evidence of any acts or declarations made either by the party himself, or which he has authorized, or to which he has assented.¹

It is plain also that this principle does not exclude the operation of any general rule of law or custom; of these, and all their consequences, he is bound to take notice at his peril.

It follows, therefore, that even the acts and declarations of others are not excluded by this principle, whenever they have any legal operation which is material to the subject of inquiry; for legal consequences can no more be regarded as *res inter alios* than the law itself. For instance, where the contest is as to the right to a personal chattel, evidence is admissible, even against an owner who proves that he never sold the chattel, of a subsequent sale of the property *in market overt; for although he was no party to the transaction, which took place entirely between others, yet [*86 as such a sale has a legal operation on the question at issue, the fact is no more *res inter alios acta* than the law which gives effect to such a sale. So in actions against a sheriff, it very frequently happens that the law depends wholly on transactions to which the sheriff is personally an entire stranger; where the question is as to the right of ownership to particular property seized under an execution, all such transactions and acts between others are admissible in evidence which in point of law are material to decide the right of property. So in all cases where any statute or law, or decree or judgment, is of a public nature, or operates *in rem*; for to such proceedings all are privy.

Nor does the objection ever apply where the conduct or declaration of another operates not by way of admission or mere statement, but *as evidence*. Thus, if *A* make a private memorandum of a fact in which *B* has an interest, that memorandum, generally speaking, would not be evidence against *B*; it would fall within the description of *res inter alios acta*; but if it were a memorandum of a fact peculiarly within the knowledge of *A*, and made in the usual course of business, or if *A*, by that entry charged himself, it would be admissible in evidence after the death of *A*; not that it operates

¹ Vol. II., tit. ADMISSIONS. *Spargo v. Brown*, 9 B. & C. 935; E. C. L. R. 17.

against *B* by way of admission of the fact, for if so it would be admissible whether *A* were living or dead, but because, under those circumstances, the law considers the entry to be a proper medium for communicating the original fact to the jury, the testimony of *A* himself being unattainable.

So the declarations of deceased persons, and evidence of reputation, in matters of public prescription, pedigree, and character, are admissible, not because strangers have any power to conclude a party by what they may choose wantonly to assert upon the subject, but because the law considers the evidence to be sufficiently deserving of credit, as a means of communicating the real fact, to be offered to *a jury. And whenever that is the case, it is *87] obvious that such declarations or reputation are no more *res inter alios* than if the declarants themselves had stated what they knew upon oath to the jury.

In the next place, although the general principle above announced excludes the declarations, writings, acts and conduct of strangers, as falling within the general description of *res inter alios actæ*, the objection does not extend to a class of declarations already described as declarations accompanying an act; for these, when the nature and quality of the act are in question, are either to be regarded as part of the act itself, or as the best and most proximate evidence of the nature and quality of the act: their connection with the act either sanctions them as direct evidence, or constitutes them indirect evidence, from which the real motive of the actor may be duly estimated.

Hence it is that declarations, made by a trader at the time of his departure from his residence or place of business, are evidence of the intention with which he went. His real intention, in such a case, cannot be inferred otherwise than from external appearances, from his acts; and his declarations are collateral indications of the nature of his acts and his intention in doing them.^u Upon the same principle, in *Lord George Gordon's Case*, the cries of the mob, at the time they were committing acts of violence, were held to be admissible evidence to show their intention.^x Such evidence is also admissible in actions against the hundred, in case of an action to recover the value of property feloniously demolished by persons riotously assembled. Again, in order to prove that a husband had obliged his wife to leave his house by ill treatment,

^u See tit. **BANKRUPT.**

^x 21 Howell's St. Tr. 542.

the declaration of the wife at the time of leaving the house was held to be admissible evidence against the husband to prove the fact. Here the fact itself of leaving the house was material and admissible, and the declaration accompanying the fact was collateral evidence *of the nature of the act. The same principle applies, as will be seen, in actions for criminal conversation. [88 There the terms on which the plaintiff and his wife lived previous to the adultery, being material to the inquiry, declarations by the wife in the absence of the husband, and letters written by her, not only to him but even to third persons, are admissible evidence to show the state of her mind and her affection for him.⁷ So, declarations by a patient⁸ to a medical attendant, as to his state of body and sufferings at the time, are evidence of the fact, for in many cases they furnish the only means of ascertaining that state, and they are, in reality, part of his examination; but declarations so made as to the independent fact of the cause or the origin of that state are not admissible.*

It is, however, to be particularly observed, that in these [*89 *cases, when declarations or entries^b are admitted in evi-

⁷ *Per* Lord Ellenborough, 6 East, 188; and see Vol. II. CRIMINAL CONVERSATION.

⁸ 6 East, 188. It has been truly observed, that representations made by a party, as to his health and sensations, when made to a medical attendant, who has the opportunity of observing whether they correspond with the symptoms to which they refer, are entitled to greater weight than such as are made to an inexperienced person. Phillips on Evidence, 9th ed. vol. i. p. 190, citing the observations made by the Attorney-General (Copley), in the *Gardiner Peerage Case*. In *Aveson v. Lord Kinnaird*, the rule is laid down as to patients without qualification. The admissibility of such evidence is in principle confined to representations made as to the state of the party at the time of making the representation, as contradistinguished from any statement of a particular fact occurring at any antecedent time. In the *Gardiner Peerage Case*, p. 79-136, 170, where it became material to inquire into the ordinary period of gestation, the medical witnesses were not permitted to state what had been said by women whom they had attended in their confinement, as to the date of their conception.

* *Aveson v. Lord Kinnaird*, 6 East, 188; *Reg. v. Johnson*, 2 Car. & K. 354; E. C. L. R. 61; *per* Parke, B., *Reg. v. Guttridge*, 9 Car. & P. 472; E. C. L. R. 38. In the case of *Rex v. Foster*, 6 Car. & P. 325, E. C. L. R. 25, it was held by Gurney, B., and Park, J., that a declaration by one since deceased, instantly on receiving a fatal injury, as to the cause of the injury, was admissible. And see further on this subject, *Rex v. Megson*, 9 C. & P. 420; E. C. L. R. 38; *Rex v. Osborne*, Car. & M. 622; E. C. L. R. 41; Vol. III. RAPE; ENTRIES BY THIRD PERSONS, *post*.

^b In future, to avoid repetition, the term declaration alone will be used; but it must be remembered, that the same principle applies to a written entry.

dence as part of the *res gestæ* or transaction, they are admitted, either because they constitute the very fact which is the subject of inquiry,^o or because they elucidate the facts with which they are connected, having been made without premeditation or artifice, and without a view to the consequences; and as such they are the best evidence—it may be, better than even the subsequent testimony of the party who made them—to prove the object for which they are admitted in evidence; for the party who made the declaration, if he were competent as a witness, would frequently be under a temptation to give a false colouring to the circumstance when its tendency was known; besides, as in this case the effect of the evidence is independent of the credit due to the party himself, it could be of no use to confirm his credit by examination upon oath, and his declaration as a mere fact is as capable of being proved by another witness as any other fact is.¹

^o See *Kent v. Lowen*, 1 Camp. C. 177. It is indeed only when the fact by which the declaration is accompanied is material and relevant that the declaration is admissible; see *R. v. Bliss*, 7 A. & E. 550; E. C. L. R. 34; *Doe d. Tatham v. Wright*, 7 A. & E. 313; E. C. L. R. 34; 6 Nev. & M. 132; E. C. L. R. 36; 4 Bing. N. C. 489; E. C. L. R. 33; and 2 Nev. & P. 305. For further illustrations of these principles, see tit. ENTRIES BY THIRD PERSONS.

¹ To be a part of the *res gestæ*, the declarations must have been made at the time of the act done which they are supposed to characterize, and calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction; per Hosmer, C. J., in *Enos v. Tuttle*, 3 Conn. 250; *Carter v. Buchanan*, Kelly, 513. It is difficult however to lay down any precise general rule as to the cases in which declarations are admissible as part of the *res gestæ*; *Allen v. Duncan*, 11 Pick. 309; *Pool v. Bridges*, 4 Pick. 378. See 3 Cowen & Hill's Phillips, 589, note, 452 for a very elaborate and extended examination of the American cases.

Where evidence of an act done by a party is admissible, his declarations, made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible, as part of the *res gestæ*; *Sessions v. Little*, 9 N. Hamp. 271; *Russell v. Frisbie*, 19 Conn. 205; *Elkins v. Hamilton*, 20 Verm. 627; *Woods v. Bank*, 14 New Hamp. 201. In an action against an individual for enticing away the servant of another, evidence of the declarations of the servant, at the time he left as to the motive which influenced him, are admissible; *Hadley v. Carter*, 8 N. Hamp. 40. In a suit where the question of domicil is raised, the declarations and letters of the party whose domicil is in dispute are admissible in evidence, especially if made previous to the happening of the event which gave rise to the suit; *Thorncliffe v. Barton*, 1 Metc. 242; *Kilburn v. Bennett*, 3 Ibid. 199; *Corinth v. Lincoln*, 34 Maine, 310.

It is error to exclude the declarations made by a person in explanation of the

It sometimes happens that a declaration is evidence for a particular purpose, although it is not to be taken as evidence to prove the truth of the fact declared; for the rule seems to be, that if the declaration be evidence as a circumstance in the cause, for any

delivery of chattels, when an inference unfavorable is sought to be drawn from the fact of delivery. The declarations made at the time are a part of the transaction and proper to be given in evidence as part of the *res gestæ*; *Yarborough v. Moss*, 9 Ala. 382. Where a bank discounted a note on condition that it should be indorsed by A., and A. afterwards indorsed the note, it was held in a suit against A. on the note, that a declaration made by the cashier to the directors of a bank in session when the note was offered for discount, that A. would indorse the note, upon which declaration the note was discounted, was admissible as part of the *res gestæ*; *Mitchell v. Planters' Bank*, 8 Hump. 216. Declarations of a donor at the time of the delivery of slaves, that they were delivered to the trustee, pursuant to the provisions of a deed are admissible on the same principle; *Hale v. Stone*, 14 Ala. 803. Where the acts of parties to a transaction are evidence against third persons, their declarations if they are inseparably connected with the acts so as to constitute a part of the *res gestæ*, are also admissible; *Robertson v. Smith*, 18 Ala. 220. So declarations by parties in possession of real or personal property in order to show the character of such possession; *Brazier v. Burt*, 18 Ala. 201; *Clealand v. Huey*, 18 Ala. 343; *Perry v. Graham*, Ibid. 822; *Fontaine v. Burr*, 19 Ib. 722; *Marcy v. Stone*, 8 Cush. 4.

To make declarations a part of the *res gestæ*, they must be contemporaneous, with the main fact; but in order to be contemporaneous they are not required to be precisely concurrent in point of time. If the declarations spring out of the transaction—if they elucidate it—if they are voluntary and spontaneous, and if they are made at a time so near to it, as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous; *Mitcheson v. The State*, 11 Geo. 615. The declarations of a party paying money, for the purpose of showing the application or appropriation of the money paid, are admissible: and when made at the time of payment, they become part of the *res gestæ*; *Bank of Woodstock v. Clark*, 25 Verm. 308.

On the other hand, the holder of a check went into a bank and when he came out, said he had demanded its payment. This declaration was held inadmissible, to prove a demand; as being no part of the *res gestæ*. The demand was the fact to be proved; *Brown v. Lusk*, 4 Yerger. 210. If the declaration of a person is in itself a fact in a transaction or is made by him while doing an act and seems to explain it, it is to be received in evidence as part of the *res gestæ*; but a recital of past transactions is not admissible, although it may have some relation to the act which the person may be doing when he makes such declaration; *Haynes v. Rutter*, 24 Pick. 242; *Buswell v. Davis*, 10 N. Hamp. 413. Where the plaintiff, for the purpose of showing the reason for a change of his residence, offered in evidence his declarations, made before and after it took place, not in the presence of the defendant, it was held that such declarations, not accompanying any act, were not a part of the *res gestæ*, and were inadmissible; *Ladd v. Abel*, 18 Conn. 513; *Bradford v. Haggerty*, 11 Ala. 698; *Smith v. Webb*, 1 Barb. 230. To make the declarations of a party evidence in his favour, as part of the *res gestæ*, they

purpose, it is to be received; and the jury are to be directed not to consider it as an evidence for other purposes, for which, abstractedly, it could not have been received;^d as, for instance, where it is *used as introductory of some other matter. *90] Suppose the question to be, whether *A* had wounded *B*, if *C* had asserted in the presence of *A* that he had seen him wound *B*, this would be admissible evidence, but only as introductory, and for the purpose of introducing and explaining *A*'s conduct and behaviour when the charge was made, and his answer upon that occasion, and not as having any intrinsic tendency to prove the fact asserted.

In the next place, it is observable that the principle is confined to those cases where an inference is attempted to be made from the acts, conduct or declarations of strangers, on the presumption that they would not have done such acts, or made such declarations, had not the fact so to be inferred been true; and that it is the want of any certain or known connection between such acts or declarations and the truth of the fact which occasions the exclusion. Hence it is that the principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can reasonably be made. Thus, upon the trial of a prisoner on a charge of homicide or burglary, all circumstances connected with the state of the body found, or house pillaged, the tracing by stains, marks or impressions, the finding of instruments of violence, or property, either on the spot or elsewhere, in short, all

^d In the case of *Vacher v. Cocks*, M. & M. 353, E. C. L. R. 22; Lord Tenterden allowed that part only of the letter to be read which contained the refusal. See further tit. WRITTEN EVIDENCE; and *Willis v. Bernard*, 8 Bing. 376; E. C. L. R. 21; *Whitehead v. Scott*, 1 M. & Rob. 2; *Whitaker v. Bank of England*, 6 C. & P. 700; E. C. L. R. 25.

must be connected with the material fact or inquiry involved in the issue; *Tomkies v. Reynolds*, 17 Ala. 109; *Plumer v. French*, 2 Foster, 450. Before the declaration of a party can be received in evidence in his own favour, as explanatory of his possession the fact of possession must be established to the satisfaction of the Court; otherwise the declarations would be made evidence of the possession itself or the title rather than as explanatory of the nature of the possession; *Thomas v. Degraffenreid*, 17 Ala. 602. The declaration of one who is in possession of personal property, explanatory of his possession are admissible evidence; but his declarations in regard to the contract by which he came into possession are not admissible evidence in his favour; *Mims v. Sturdevant*, 23 Ala. 664.

visible *vestigia*, as part of the transaction, are admitted in evidence, for the purpose of connecting the prisoner with the act.

Such facts and circumstances have not improperly been termed inanimate witnesses. It may be asked, whether the same principle which excludes all inferences from the acts, conduct and declarations of others, ought not also to exclude such real circumstances; for an artful person may *not only deceive by speaking and writing, but may also create false and deceptive appearances, [91 calculated to induce others to draw false conclusions from them; he may act as well as speak a lie, and may deceive by false facts as well as false expressions.* Real facts, that is, such as are the object of actual observation, in contradistinction to mere recitals of facts, are in themselves always true, whilst a mere recital or statement may be wholly false; and although collateral circumstances, when considered without careful comparison, may, either in consequence of contrivance and design, or even from accident, present appearances which tend to false conclusions, that *tendency [92 is always subject to be corrected by a multitude of other facts which are genuine.

* An ancient and celebrated argument supplies an illustration. A young man who was blind, a resident in his father's house, was charged by his step-mother with having assassinated his father by stabbing him whilst he slept. The evidence was circumstantial; and one of the prominent facts urged against the son was the circumstance that the walls of the apartments which separated the chamber of the father from that of the son were smeared with the impressions of bloody hands, proceeding from the chamber of the father to that of the son. With respect to such evidence, which according to the rules of our law would clearly be admissible, it may be objected, that such appearances may have resulted from the art and cunning of another, for the very purpose of implicating the accused; and also it may be, as suggested in the case cited, for the further purpose of screening the real perpetrator of the offence.

Since, then, it is possible that such appearances may be the result of fraud and artifice, ought they to be admitted? or, at least, are they not subject to the same objection which is urged against receiving evidence of the declarations or writings of others? The answer seems to be, that although a possibility exists that such appearances may have resulted from contrivance and design, yet that much less danger is to be apprehended from the reception of such evidence of actual facts than would result from receiving evidence of mere statements of facts.

In the case above supposed, two circumstances tended to show that the traces on the walls were the result of artifice and imposture. The accused being blind, night to him was the same as the day, and being familiar with the apartments, he wanted not the walls for his guidance. The impressions on the walls were all equally clear and distinct; had they been natural and genuine, they would have gradually become faint and indistinct.

The whole context of facts must be consistent with truth; to speak more properly, they constitute the truth; if all were known, nothing would be left for inquiry; the greater the number known, the more probable will it be that an artificial or spurious fact, from inconsistency with the rest, will be detected, and the truth manifested. This is the more evident, when it is considered that the practice of creating false appearances must always be difficult, limited in its extent, and constantly subject to detection and exposure from a comparison of the deceptive fact with such as are undoubtedly genuine.

By way of illustration, the following instance may be selected: A person having been robbed and murdered, the body is so placed by the offender, with a discharged pistol beside it, as naturally to induce the inference that the deceased had fallen by his own hand; but on close examination, it is discovered that the ball extracted from the body, and which occasioned death, is too large to have been discharged from that pistol, an inconsistency which immediately detects the imposture, and refutes the false inference to which *some* of the circumstances apparently tend.

The general admission, therefore, of evidence of the actual visible state of things, in the absence of any special reason for suspecting fraud, is quite consistent with the exclusion of statements or declarations, as contradistinguished from real facts; such statements may be altogether fictitious; they are easily invented, and would therefore be the more dangerous, because if they were to be admitted to any credit, they would usually be conclusive. At all events, there is a strong practical necessity for resorting, especially in criminal proceedings, to the aid of circumstantial evidence; the consequences would be infinitely mischievous if such evidence were to be excluded; and the real
 *93] practical result from any suggestions as to the *probability of fraud and deception being practised through the medium of such evidence, is, that it ought in all cases to be received and acted on in the highest degree of caution and circumspection.

As the possession and enjoyment of disputed property are always indirect evidence of right, by reason of the obvious and natural presumption, when the right is in other respects doubtful, that such possession and enjoyment so acquiesced in had a lawful origin; so, acts of open delivery of possession, or written instruments by which a dominion over such property was exercised, and with which the possession and enjoyment correspond, are also pre-

sumptive evidence of right; for these are, in fact, not mere recitals of a fact, but are of themselves acts of dominion and ownership. Hence, when such instruments are so ancient that their connection with acts of enjoyment and dominion cannot be proved by the testimony of living witnesses, they are nevertheless admissible as the best and most proximate evidence to explain the origin and nature of such possession and enjoyment, where they can by other evidence be sufficiently connected with those facts.

Hence it seems that to support any presumption or inference from such an instrument, first, its antiquity is essential; secondly, that it should have been found in the place or repository in which a true or genuine deed or writing of that kind would have been deposited; thirdly, that it should be free from all suspicion which may rebut the presumption raised in its favour;^e and, fourthly, in order to give it any weight, it should be supported by proof of possession or enjoyment, corresponding and consistent with it.^h Upon such a connection the force, if not the admissibility, of such evidence essentially depends. Declarations are, as has been seen, evidence as explanatory of the act which they accompany; and where long-continued enjoyment, and user of a right, have been *proved, extending as far back as the duration of human life will permit, a deed or writing which is consistent with such usage and enjoyment, and explanatory of it, may, under the same principle, be fairly admitted, as affording a presumption that it was a genuine instrument which has been used and acted on. And where proof of the actual execution and use of such instruments would have been evidence, then when such proof is absolutely excluded by lapse of time, the production of the deed, coupled with such circumstances as give it credit, appears to be the next best evidence which the case admits of, and when accompanied with proof of actual enjoyment, affords a strong presumption as to the existence of the right according to that deed. Hence, ancient licenses on the court-rolls, granted by the lords of a manor in consideration of certain rents, to fish in a particular river, are evidence to prove a prescriptive right of fishery in that river, without any proof of the rents being formerly paid, where it appears that such rents have been paid in modern times, or that the lords of the manor have exercised other rights of ownership

^f *Vide infra*, PRIVATE WRITINGS—ANCIENT DEEDS.

^e *Ibid.*

^h *Ibid.*

over the fishery.¹ But it was held that to give any weight to such evidence, it was necessary to support it by evidence of payments, or of acts of ownership.^k And where the question was, whether in a particular manor a custom existed that, after the turbary had been cleared away from a certain moss, the lord had a prescriptive right to hold the land cleared, free from all right of common, it was held (in an action between a grantee of the land and one who claimed common in the *locus in quo*, in respect of an ancient mesuage) that counterparts of old leases found among the muniments of the lord of the manor, by which such cleared portions of the moss had from time to time been granted by the lord, were admissible in evidence, although they were so old that no one could *95] speak to possession under them. It was *objected, both at the trial and on a motion for a new trial, that such evidence ought not to be admitted without proof of enjoyment under those leases. But the Court held that it was clear that such leases might be given in evidence; they only showed the existence of a fact, viz., that at the time of the dates of the leases the lord granted the land after the moss had been taken away.^l

¹ *Rogers and others v. Allen, cor. Heath, J.*, 1 Camp. 309.

^k *Per Heath, J.*, 1 Camp. 311.

^l *Clarkson v. Woodhouse*, 5 T. R. 412.

¹ For a very full collection of the American authorities see note 903, 4 Cowen & Hill's Phillips, 1310.

The English law upon this subject seems very generally adopted in the United States, and ancient deeds accompanying possession are admitted in evidence without further proof; *Carroll v. Norwood*, 1 Har. & John. 167; *Sims v. Degraffenreid*, 4 McCord, 253; *Waldron v. Tuttle*, 4 N. Hamp. 371; *Thompson v. Bullock*, 1 Bay, 364; *Thruston v. Masterson*, 9 Dana, 228; *Brown v. Witter*, 10 Ohio, 142; *McClusky v. Leadbetter*, 1 Kelly, 551; *Doe v. Eslava*, 11 Ala. 1028; *Winston v. Gwathmey*, 8 B. Mon. 19; *Homer v. Cilley*, 14 N. Hamp. 85; *Troup v. Hurlbut*, 10 Barb. Sup. Ct. 527; *Carter v. Chaudron*, 21 Ala. 72.

There must be no erasures or alterations; *Roberts v. Stanton*, 2 Munf. 129. The antiquity alone of a deed apparently defective is not sufficient to justify the presumption of its due execution; *Williams v. Bass*, 22 Verm. 352.

As to the nature and extent of the possession required, it has been decided that where there was continued possession for six years, under a deed thirty years old, which was recorded about the time it was executed, there having been no possession inconsistent with the deed, it should be received as an ancient deed; *Robinson v. Craig*, 1 Hill S. C. 389. So where possession for five years was proved; *Wagner v. Acton*, 1 Rice, 100. In New York and some other of our sister States, and perhaps in England, it seems to be settled that a deed appearing to be of the age of thirty years, may be given in evidence without proof of its execution, either by showing an accompanying possession, or when there has been none such, rendering

It is to be observed that oral or written declarations, although excluded as direct evidence of a fact, by the rules which govern the reception of such evidence, may still in many instances be used indirectly as explanatory of other evidence. Thus, though a letter, stating particular facts, could not be read in evidence merely because it was sent, yet if the party to whom it was addressed wrote an answer, such answer might be read as evidence against the party who wrote it, and the letter to which it was an answer would be admissible for the purpose of explaining such answer.¹

So letter and declarations, in themselves inadmissible, are admissible if they communicate any fact to the party against whom they are read which either affects the rights in question or explains his subsequent conduct.^m Thus the proof of notice of the dishonour

^m See further, as illustrative of this principle, *Cotton v. James*, M. & M. 273; E. C. L. R. 22; *Taylor v. Willans*, 2 B. & Ad. 845, E. C. L. R. 22.

such an account of it as will afford a reasonable presumption of its being genuine. It has been said by authority highly respectable, that almost any evidence, intrinsically unobjectionable, and tending to raise a presumption of the fairness of the instrument may be received, leaving its sufficiency to depend on the nature of each particular case; *Jackson, ex dem. Lewis v. Zarowey*, 3 Johns. Cas. 283; *Hewlett v. Cock*, 7 Wend. 371. Though it must be confessed that in Pennsylvania the leading of the determinations is in favour of the more rigid rule which refuses to accept of any thing short of actual possession, as corroborative of the supposed deed. But where the issue litigated involves the title of wild and uncultivated land, which has never been the subject of an actual *pedis possessio*, the question assumes a very different aspect, even in Pennsylvania. In such case the payment of taxes assessed upon the unseated land for a number of years, is for many purposes, esteemed equivalent to actual possession: Per Bell, J., in *Williams v. Hillegas*, 5 Barr, 494. Proof that a deed of land is more than thirty years old, without other circumstances, is no evidence of its authenticity, especially when no possession has been taken under it, and the land has been held adversely, although the deed is shown to have been in the custody in which it would have been likely to be if genuine; *Willson v. Betts*, 4 Denio, 201; *Ridgeley v. Johnson*, 11 Barb. Sup. Ct. 527.

¹ The defendant, having read a letter from the plaintiff's agent in answer to a letter from himself, cannot give in evidence a copy of his own letter, without proving it to be a true copy, by a witness; *Smith v. Carrington*, 4 Cranch, 61. A letter written by the plaintiffs to the defendants and received by them being in answer to one by the defendants to the plaintiffs, which had been read as evidence in the cause, having been filed by the defendants and read by them on a former trial, was held, under the circumstances, to be competent evidence for the plaintiffs; *Downes v. Morrison*, 2 Gratt. 250. A letter written by the plaintiff to the defendant, relative to the subject-matter of the suit, although written after the commencement of the suit and a reply thereto by the defendant, are together admissible in evidence on the part of the plaintiff; *Holler v. Weiner*, 3 Harris, 242.

of a bill of exchange to a drawer or indorser is evidence, not of the fact of dishonour stated in the notice, but because such notice casts a legal liability on the party to whom it was given. So again, in an action on a policy of insurance, for a libel, keeping a mischievous animal, malicious prosecution, and indeed in any other case where the knowledge, motives, or intentions of the parties were material, communications, whether oral or written, may be very important evidence, though not of the truth of the facts communicated, yet for judging as to the motives, intention and honesty of the party to whom the communication was made.

*Of the class of facts which require proof by means of
*96] indirect evidence, there are some of so peculiar a nature that juries cannot without other aid come to a correct conclusion on the subject. In such instances, where the inference requires the judgment of persons of peculiar skill and knowledge on the particular subject, the testimony of such as to their opinion and judgment upon the facts, is admissible evidence to enable the jury to come to a correct conclusion. Thus the relation between a particular injury inflicted on a man's body and the death of that man, is an inference to be made by medical skill and experience, and may be proved by one who possesses those qualifications. So again, where the question is as to a general result from books or accounts of a voluminous nature, the general result from them may be proved by the testimony of one who has examined them.¹

¹ A practical surveyor, in testifying respecting marks on trees or piles of stones, may express his opinion whether they were intended as monuments of boundaries; *Davis v. Mason*, 4 Pick. 156. See also *United States v. Gilbert*, 2 Sumner, 93. G.

A land surveyor testified that he had run out the lines of lots surveyed by a former surveyor, and was familiar with his mode of marking corners, and then testified to certain marks upon certain alleged corners, as having been made by the former surveyor: *Held*, that his belief that the marks were those made by the former surveyor was not evidence to be received by the jury as the opinion of an expert, but was merely the testimony of a witness to a fact within his knowledge, and was to be credited by the jury only so far as they believed him able from his personal knowledge to identify the marks in question; *Barrow v. Cobleigh*, 11 N. Hamp. 557.

When the opinion of an expert is offered in evidence, the court may hear evidence to ascertain whether he is an expert, and then allow the opinion to be given in evidence to the jury; *Mendum v. Commonwealth*, 6 Rand. 704. This may be done either by examining the witness himself or from the testimony of others; *Tullis v. Kidd*, 12 Ala. 648. As a general rule the opinion of witnesses is not to be received in evidence, merely because they may have had some experience or greater opportunities of observation than others, unless they relate to matters

CHAPTER V.

ARTIFICIAL EVIDENCE.

THUS far the law controls the admission of ordinary evidence, by the application of excluding tests; it is next to be considered how far the law interferes to create evidence, or to add to its efficacy by artificial means.

It is essential, in the first place, that the law should provide the means of preserving public statutes and ordinances, the decrees and judgments of its Courts, and many other transactions of public interest, and for authenticating them as such when it should become necessary; and it is also essential to the convenience of individuals that the evidence of their mutual dealings and engagements should not be left to depend on the defective memories of living witnesses, but should be preserved by the aid of written *memorials, mutually agreed upon, for the purpose of [97 perpetuating those transactions. The law itself, therefore, provides authentic memorials of judicial proceedings, and of many other matters of a public nature, by means of its own officers specially delegated to the trust.⁴

Of this description are the rolls of Parliament, public registers, and all records of Courts of justice; and as these are made by ministers or officers specially authorized by the law, for the very purpose of perpetuating the facts which they contain, it is to be

⁴ See tit. JUDGMENT—RECORD.

of skill or science; *Robertson v. Stark*, 15 N. Hamp. 109; *Lush v. McDaniel*, 13 Iredell, 485; *McLean v. The State*, 16 Ala. 672; *Luning v. The State*, 1 Chand. 178.

The opinion of a witness is not admissible, except of a professional man in a matter depending on science or skill in his particular art, or when it is necessary from the nature of the inquiry, as for example as to the sanity of a person, but this must be from personal observation of the particular case, unless the witness be a professional man; *Lester v. Pittsford*, 7 Verm. 161; *Doe v. Reagan*, 5 Blackf. 217; *Milton v. Rowland*, 11 Ala. 732. The opinions of medical men may be asked upon supposed cases similar to the one before the court; *State v. Powell*, 2 Halst. 244; *Luning v. The State*, 1 Chand. 178; *United States v. McGlue*, 1 Curtis C. C. 1. And it is not confined to medical men but extends to all other professions and trades; *Price v. Powell*, 3 Comst. 322; *Smith v. Gugerty*, 4 Barb. Sup. Ct. 614; *Steamboat Clipper v. Logan*, 18 Ohio, 375; *The State v. Cheek*, 13 Iredell, 114.

presumed that they are true memorials, and they are admissible evidence of those facts, though they are not sanctioned by the ordinary tests of truth. And it may further be observed, that as these memorials relate for the most part to matters of public concern and notoriety, the application of the ordinary tests is not so requisite as in ordinary cases. On this principle, even books of history are admissible to prove public and notorious historical facts.¹

But though the law in such cases does not require the aid of the ordinary tests of truth, yet in these, as well as in all other instances, the *res inter alios acta* is always excluded. Many of the matters which the law records by instruments of its own creation are of a public nature, to which all may be considered privy; as in the case of public proclamations, acts of state, public registers of births and marriages. In the cases of judicial records, although in one sense they are of public notoriety, and, therefore, although such a record is always evidence of the mere fact that such a cause was litigated and such a judgment given, whenever the mere fact is material, yet they are not admissible evidence of the facts and rights *decided* by the decree or judgment, where they are of a private nature, unless as against one who was party or privy to the proceeding, nor usually, as will be seen, even then, unless he who offers the evidence was also a party or privy; in all *other cases the objection that the affair was *res inter alios* *98[*acta* must prevail.¹

^r See tit. JUDGMENT.

¹ All evidence of this sort must be considered as mere hearsay; and certainly, as hearsay, it is of no very satisfactory character. Historical facts, of general and public notoriety, may indeed be proved by reputation; and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts, which do not presuppose better evidence in existence; and where, from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. But the work of a living author, who is within the reach of process of the court, can hardly be deemed of this nature. He may be called as a witness. He may be examined as to the sources and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom he has derived his materials; there would seem to be cogent reasons to say, that his book was not, under such circumstances, the best evidence within the reach of the parties; *Morris v. Lessee of Harmer's Heirs*, 7 Peters, 558—per Story J.

¹ A record, which cannot be used against parties to a suit on trial, because some

As the law creates instruments for the purpose of evidence, so it frequently annexes to them an artificial weight and consequence on grounds of legal policy. Thus a record in a judicial proceeding is in many instances not simply admissible evidence, but conclusive as to the facts adjudged.¹

* See tit. JUDGMENT—RECORD.

of them were not parties to the record, cannot be used for them; *Chiles v. Conley*, 2 Dana, 21; *Hurst v. McNeil*, 1 Wash. C. C. Rep. 70; *Davis v. Wood*, 1 Wheat. 6. A judgment, not conclusive against a party, is not conclusive in his favour; *Southgate v. Montgomery*, 1 Paige Chanc. Rep. 41; *Morris v. Lucas*, 8 Blackford, 9.

When the judgment of a court of law, or decree of a court of chancery, forms a link in a chain of title, the fact of the existence of such judgment or decree may be shown by the record, in controversies with third persons as well as between the parties; *Den v. Hamilton*, 7 Halsted, 109; *Turpin v. Brannon*, 3 McCord, 261. Where the maker of a note has been prosecuted to insolvency, the record of the suit may be given in evidence against indorsers where, by the local law, it is necessary to prove due diligence in order to charge them; *Lane v. Clark*, 1 Missouri, 657. A judgment between others is evidence of the fact of its having been rendered, and competent when that fact is material; *Head v. McDonald*, 7 Monroe, 203; *Ansley v. Carlos*, 9 Alabama, 973; *King v. Chase*, 15 New Hamp. 9; *Fletcher v. Jackson*, 23 Vermont, 581.

¹ To make a record, in a former suit, conclusive evidence on any point, it should appear, from the record, that such point was in issue. And evidence *abunde* is not admissible to show that a matter not in issue on the record was taken into consideration by the jury; *Manny v. Harris*, 2 Johns. 24. A decree in chancery is conclusive evidence, in a suit at law between the same parties, of such facts as were directly in issue in the bill, and which were necessary to uphold it; *Coit v. Tracy*, 8 Conn. 268; *Pleasants v. Clements*, 2 Leigh, 474; *Pierson v. Catlin*, 18 Vermont, 77. A judgment on the merits, in a personal action, is a bar to another action on the same claim and between the same parties, though the forms of the two actions be not the same; *Lawrence v. Vernon*, 3 Sumner, 20. A verdict, in an action of detinue, against the plaintiff, on the plea of *non detinet*, is not sufficient evidence in another suit to show that the plaintiff had not title to the thing demanded. If, in such case, parol evidence can be introduced to show the grounds on which the verdict was given, this evidence must prove conclusively that the jury could have found their verdict upon no other ground than want of title in the plaintiff; *Long v. Bangas*, 2 Iredell, 290. In an action of trespass *quare clausam fregit*, the defendant pleaded the general issue, and filed a notice that he claimed and should give evidence of title to the *locus in quo*. The jury found the defendant guilty, assessed damages, and also found that the defendant had no title to the land described in the plaintiff's declaration; and judgment was rendered for the plaintiff. It was held that this judgment was not conclusive proof of the plaintiff's right of property in said land, nor of his title to maintain a writ of entry to recover the land from the defendant in that action; *Wade v. Lindsay*, 6 Metc. 407. See *Darlington v. Gray*, 5 Wharton, 487; *Piper v. Richardson*, 9 Metc. 155; *Dukes*

It is however very clear, that the previous verdict of a jury is not only inconclusive, but that in its own nature it cannot possibly be conclusive as to the truth of a fact which it professes to ascertain, where that fact is again disputed. It is possible that the former jury may not have been supplied with sufficient evidence to enable them to come to a correct conclusion, or that they may have fallen into error, or even that they may have been swayed by indirect motives. But the law, on a strong principle of policy and convenience, and in order to exclude continual litigation, frequently annexes an artificial conclusive effect to a former verdict.

Again, where formal instruments are prescribed or adopted by convention, for the purpose of manifesting and perpetuating the acts and transactions of private individuals, the law interferes not only in prescribing the manner and form, but also in giving an artificial effect to such instruments.

The ordinary instances in which the law prescribes the form and manner in which private persons shall express their acts and intentions, and record their engagements, are, in cases of wills of real property, grants of incorporeal rights, which must be evidenced by a specialty, and agreements, which in many instances prescribed by the Statute of Frauds^{*} must be evidenced by some written memorandum of the transaction. In these and other instances where the law prescribes the form, the evidences of the fact *must of course consist in proof that the legal requisites *99] have been complied with in the particular instance.

The admissibility of such conventional means of perpetuating the transactions between individuals, falls for the most part within the

^{*} See FRAUDS, STATUTE OF.

v. *Broughton*, 2 Speers, 620. In covenant for instalments of money, a former recovery between the same parties, on the same instrument, is not a bar where breaches for the instalments demanded in the latter action were not specifically assigned in the former suit; and evidence is admissible to show that the instalments now demanded had not fallen due, and were not included in the former recovery. It would be otherwise where the former claim was entire and for a sum of money *in solido*; *Sterner v. Gower*, 3 Watts & Serg. 136. Upon the general subject of the conclusiveness of judgments, see *Gates v. Goreham*, 5 Vermont, 317; *Shafer v. Stonebreaker*, 4 Gill. & Johns. 345; *Gardner v. Buckbee*, 3 Cowen, 120; *Hibshaum v. Dullebum*, 4 Watts, 183; *Robinson v. Crowninshield*, 1 New Hamp. 76; *Livermore v. Herschell*, 3 Pick. 33; *White v. Philbrick*, 5 Greenleaf, 147; *Boynton v. Willard*, 10 Pick. 166; *Marsh v. Pier*, 4 Rawle, 273; *Burnham v. Webster*, 1 Woodbury & Minot, 172; *Pinney v. Barnes*, 17 Conn. 420.

ordinary and natural rules of evidence. They are, in effect, formal admissions by the parties who make them, and as against themselves are therefore admissible. The admission of such evidence is quite consistent with the general rule which excludes all that is *res inter alios acta*; such evidence would therefore be *admissible* independently of any artificial rule of law, but when admitted, the law frequently annexes an artificial efficacy which such evidence would not otherwise possess.^a

The law not only in many instances prescribes the manner and form of the instrument by which such acts and intentions shall be signified, but frequently annexes an artificial and arbitrary effect to the evidence. Thus the law provides that a specialty, such as a bond, shall carry with it intrinsic and conclusive evidence that it was founded on a good and sufficient consideration, without any other proof; that a bill of exchange shall afford, not conclusive, but *primâ facie* evidence of consideration; whilst in other cases of mere parol engagements a consideration will not be presumed, but to give them effect must usually be alleged and proved.

The doctrine of estoppels by deed affords another prominent instance of the law's interference to annex an artificial effect to particular evidence. It is a general rule of law that a man shall be estopped or excluded from the averment or proof of that which is contrary to his admission by deed;¹ but he is not estopped in

^a See tit. BOND—DEED—BILL OF EXCHANGE.

^{*} See tit. DEED. *Bonner v. Wilkinson*, 5 B. & Ald. 682; E. C. L. R. 7.

The rule that a party is estopped by his deed, does not preclude a party from asserting that the transaction was contrary to law, or void on the ground of fraud, and for this purpose giving evidence to contradict the statements contained in the deed. *Fairtitle, ex dem. Mytton v. Gilbert*, 2 T. R. 169; *Collins v. Blantern*, 2 Wils. 341; 1 Smith, Lead. Ca. 154, *et notæ*; *Doe dem. Chandler v. Ford*, 3 Ad. & E. 649; E. C. L. R. 30; *Doe dem. Williams v. Lloyd*, 5 Bing. N. C. 741; E. C. L. R. 35; *Hayne v. Maltby*, 3 T. R. 438; *Chanter v. Leese*, 4 M. & W. 295.

¹ *Stow v. Wyse*, 7 Conn. 214; *Wilkinson v. Scott*, 17 Mass. 249; *McDonald v. King*, Coxe, 432. One who conveys land without having a title, is estopped from claiming it, if he afterwards acquires a title; *McWilliams v. Nisly*, 2 Serg. & Rawle, 507; *Brown v. McCormick*, 6 Watts, 60; *Somes v. Skinner*, 3 Pick. 52. One holding a vested interest and a contingent interest in land, and conveying by deed with warranty "his right, title and interest" therein, passes his vested interest only by the deed, and is not estopped thereby to claim his contingent interest when it becomes vested; *Blanchard v. Brooks*, 12 Pick. 47. The guardian of a person *non compos*, sold certain real estate belonging to his ward under a license of court, and conveyed the same with a covenant that he was duly authorised to sell

*100] the strict legal *sense of the term by a mere oral admission, or even a written one not under seal. Independently of an artificial rule, there is no reason why a man should be estopped or excluded from asserting the truth in one case and not in the other. So also there are numerous instances where, on a just and equitable principle, the courts hold a man to be concluded by his own conduct and representation of a fact, although contrary to the truth. Thus where a person assents to an act and derives and enjoys a title under it he cannot impeach it,⁷ and so if a man induces a tradesman to supply a woman with goods by a representation that she is his wife, he will be concluded by that representation, and will not afterwards be admitted to show that she was not his wife.²¹

⁷ *Rex v. Stacey*, 1 T. R. 4. Where a copyholder has been admitted to a tenement, and done fealty to a lord of a manor, he is estopped, in an action by the lord for a forfeiture, from showing that the legal estate was not in the lord at the time of admittance. *Doe dem. Nepean v. Budden*, 5 B. & Ald. 626; E. C. L. R. 7.

²¹ See Vol. II., tit. ADMISSIONS, and with respect to this principle see further *Pickard v. Sears*, 6 Ad. & E. 469; E. C. L. R. 33; *Freeman v. Cooke*, 2 Exch. 654.

the granted premises; it was held that the guardian was estopped by such covenant, from setting up a claim in his own right to any portion of such real estate, under a previous conveyance to him in his own right; *Heard v. Hall*, 16 Pick. 457; but see *Comstock v. Smith*, 13 Pick. 116; *Allen v. Sayward*, 5 Greenl. 227.

This estoppel in general extends to all the facts recited in the deed,—but an exception has been allowed as to the recital of the amount of the consideration and the fact of its payment; *Wilkinson v. Scott*, 17 Mass. 249; *Davenport v. Mason*, 15 Mass. 85; *Schillinger v. McCann*, 6 Greenl. 364; *Buffum v. Green*, 5 New Hamp. 71; *Taggart v. Stanberry*, 2 M'Lean, 543; *Norris v. Norris*, 9 Dana, 317; *Dyer v. Rich*, 1 Metc. 180.

¹ *Chapman v. Searle*, 3 Pick. 35; *Rice v. Bixler*, 1 Watts & Serg. 445; *Crockett v. Lashbrook*, 5 Monroe, 530. Declaring a note to be "good" to one about to purchase it, or standing by in silence when it is transferred for consideration, is an estoppel *in pais* against a debtor; *Watson v. McLaren*, 19 Wend. 557; *Petrie v. Feeter*, 21 Wend. 172; *Davis v. Thomas*, 5 Leigh. 1. A person is always estopped from denying the truth of a fact, upon the faith of which he has suffered another person to act, knowing at the time that the other's conduct was materially influenced by a reliance upon the truth of such fact; *Hicks v. Cram*, 17, Verm. 449; *Bank v. Wollaston*, 3 Harring. 90; *Rangeley v. Spring*, 5 Shep. 130. If a party having knowledge that he has a title to property stands by and sees another mortgage it to a third person, to secure a debt or liability incurred at the time, without giving notice of his title, he is estopped from setting it up afterwards

In the next place, the law interferes by annexing to particular classes of evidence artificial presumptions, as contradistinguished from the natural inferences and presumptions which a jury would have made by virtue of their own knowledge and experience. Such presumptions are not rules for arriving at the simple truth; on the contrary, they are frequently used for the very purpose of excluding the truth on grounds of special legal policy. Their object is to annex particular consequences to certain defined predicaments; in fact, therefore, they are in their operation mere rules of law.¹

Such artificial presumptions are of two kinds; first, those *which are made by the law, that is, by the courts which administer the law, without the aid of a jury; secondly, [*101 such as cannot be made but by the aid of a jury. The former again consist of conclusive presumptions, which, like the presumptions, *juris et de jure* of the civil law, admit of no proof to the contrary, or are simply *præsumptiones juris*, which may be rebutted in fact, or by some other presumption raised by the facts. Thus a deed under seal, where the execution of the instrument stands unimpeached, affords conclusive evidence of consideration.^a

But although the law will presume or intend, on proof of a fine, that it was levied with proclamations, or that the heir-at-law of one who died seised of an estate was in possession of that estate, yet these are but *primâ facie* presumptions which may be repelled by actual proof to the contrary.

Other presumptions, again, which may be termed presumptions in law and fact, are those which are recognised and warranted by

^a Vol. II., tit. PRESUMPTIONS.

in a suit at law against the mortgagee; *Thompson v. Sanborn*, 11 N. Hamp. 201. If A. having title to land stands by and encourages a sale to B., he is estopped however, only when he conceals an outstanding title not equally known to both parties; *Parker v. Barker*, 2 Metc. 423; see *McKelvy v. Truby*, 4 Watts & Serg. 323.

¹ Not only convenience, but necessity calls for a definite rule to produce certainty of result in the determination of facts which must be passed upon without proof; and such can only be obtained from the doctrine of presumption, which, however arbitrary, is indispensable, and when founded in the ordinary course of events, productive of results which usually accord with the truth; Per Gibson, C. J., *Burr v. Sims*, 4 Whart. 170. G.

law as the proper inferences to be made by juries under particular circumstances; these, it will be seen, are founded on principles of policy and convenience, and not unfrequently on an analogy to express rules of law. Thus, a jury would have been warranted in presuming, and even directed to presume a right, from evidence of an adverse and uninterrupted enjoyment of lands for twenty years, in analogy to the provisions of stat. 21 Jac. I., c. 16; although, if the jury did not infer the right from such evidence, the court could not have done it.

PART II.

OF THE INSTRUMENTS OF EVIDENCE.

HAVING thus considered generally the principles which regulate the admission of evidence, we are next to consider what are the means and instruments of evidence; how they are to be procured and used; their admissibility and effect. These are, first, oral witnesses, examined *vivâ voce* in court as to facts within their own knowledge, and in some particular instances, as to what they have heard; and, secondly, written evidence.

CHAPTER I.

ORAL EVIDENCE.

AND first, as to oral witnesses. Oral testimony, it is to be remarked, in natural order precedes written evidence. It is in general more proximate to the fact than written evidence, being a direct communication by one who possesses actual knowledge of the fact by his senses; whilst written evidence in itself requires proof, and must ultimately be derived from the same source with oral evidence, that is, from those who possessed actual knowledge of the facts.

Under this head may be considered,

1st. The mode of enforcing the attendance of a witness in civil and criminal cases, and his production of writing in his possession. The incidents to his attendance and default.

*2dly. Objections in exclusion of his testimony.

3rdly. The mode of examination in chief; cross-examination, and re-examination. [*103

4thly. The mode of rebutting his testimony.

5thly. The mode of confirming his testimony.

I. *The mode of enforcing the attendance of a witness in civil and criminal cases, and also of enforcing his production of writings in his possession, and the incidents to his attendance or default.*

His attendance upon the trial is enforced by *subpœna* or *habeas corpus*, in civil as well as in criminal cases, and also in the latter by means of his recognizance.

The attendance of a witness in *civil* cases is compelled (where the witness is not in custody) by means of a *subpœna*, which is a judicial writ, commanding the witness to appear at the trial to testify for the plaintiff or defendant, under pain of forfeiting £100 in case of disobedience.^a It is however requisite, in civil cases, to tender to the witness his reasonable expenses, not only of going to attend the trial, but also of his return; for though he may refuse to be sworn till such expenses be paid, the party may not choose to call him, and he may find it difficult to get home again.^b

If a witness wilfully neglect to attend upon the *subpœna*, he is guilty of a contempt of court, for which he is liable to an attachment.^c He is also liable to damages at common law, in an action *104] on the case by the party injured;^d * and lastly, by the stat. 5 Eliz. c. 9, s. 12, he shall forfeit for such offence £10, and yield such further recompense to the party grieved as, by the discretion of the court out of which the process shall issue, shall be awarded.^e The most usual mode of proceeding is by attachment, in which case an affidavit of personal service is necessary, and of the payment or tender of reasonable expenses.^f

Where the witness is in custody, his testimony is obtained by means of a *habeas corpus ad testificandum*, which was grantable at the discretion of the courts at common law:^g and by the stat.

^a See the form, Tidd's Forms, 283. For practice as to the form, service, and remedies for disobedience of a *subpœna*, and also the tender of expenses to witnesses, see Vol. III., tit. WITNESS.

^b *Chapman v. Pointon*, 2 Str. 1150; *Fuller v. Prentice*, 1 H. B. 49; *Hallett v. Mears*, 13 East, 15; *Ex parte Roscoe*, 1 Meriv. 189. The obligation depends on the stat. 5 Eliz. c. 9.

^c 1 Str. 510; 2 Str. 810, 1054, 1150; Cowp. 386; Doug. 561.

^d Doug. 561; *Needham v. Fraser*, 1 C. B. 815; E. C. L. R. 50.

^e Cro. Car. 522, 540; *Goodwin v. West*, Jon. 430; 5 Mod. 355.

^f *Chapman v. Pointon*, 2 Str. 1150; *Garden v. Cresswell*, 2 M. & W. 319; *Fuller v. Prentice*, 1 H. B. 49; *Horne v. Smith*, 6 Taunt. 9; E. C. L. R. 1.

^g See Tidd's Prac. 9th ed. 809; *Ex part Tillotson*, 1 Stark. C. 470; E. C. L. R. 2; and see the form and course of proceeding, Vol. III. tit. WITNESS.

44 Geo. III., c. 102, any judge of the superior courts, in England or Ireland, may award a writ or writs of *habeas corpus* for bringing up any prisoner or prisoners detained in any gaol or prison, before any of the said courts, or any sitting of Nisi Prius, or before any other court of record in those parts of the United Kingdom, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired into or determined in any of those courts.¹ And every justice of the county palatine of Chester has, by the same statute, similar authority within the limits of his jurisdiction.

A lunatic fit for examination, and not dangerous, may [*105] also be brought up from a lunatic asylum by virtue of this writ.¹ So where the witness is under the duress of some third person, as a sailor on board a man-of-war, his attendance is procured by the same means.¹

The attendance of a witness in criminal cases may be compelled by means of a *subpœna* issued in the queen's name by the justices of the court in which the offence is to be tried;^k but the more usual course in all cases of treason, felony, indictable misdemeanor, or any indictable offence is for the justices who take the informations, examinations and depositions, to bind the witnesses under the statute 11 & 12 Vict. c. 42, ss. 16 and 20, by recognizance, to appear at the next Court of Oyer and Terminer or Gaol Delivery, or Quarter Sessions, or other court at which the accused is to be tried, to give evidence.¹ In cases of murder and manslaughter, the coroner, upon any inquisition taken before him,

^h Previous to this statute it was the usual practice for the courts to award this writ upon motion, accompanied with a proper affidavit. By the stat. 43 Geo. III. c. 140, a Judge of any of the courts at Westminster may at his discretion award a writ of *habeas corpus* for bringing a prisoner detained in any gaol in England before a court martial, or before commissioners of bankrupts, commissioners for auditing public accounts, or other commissioners acting by virtue of any royal commission or warrant.

¹ *Fennell v. Tait*, 1 C. M. & R. 584.

¹ *Rex v. Roddam*, Cowp. 672.

^k *R. v. Ring*, 8 T. R. 585.

¹ See 2 Russ. on Crimes, 3rd ed. 945; 20 How. St. Tri. 355; and see *Howard v. Gossett*, 10 Q. B. 436; E. C. L. R. 59; 2 Haw. c. 46, s. 165.

¹ A sheriff is bound to bring up a person in execution on a civil suit, on a *habeas corpus ad testificandum* on being tendered the expenses of bringing him up and taking him back; *Noble v. Smith*, 5 Johns. Rep. 357. G.

is empowered by 7 Geo. IV. c. 64, s. 4, to bind the witnesses by recognizance to appear and give evidence on the trial.

Where an offender who has escaped from one part of the United Kingdom is tried in another, by virtue of the stat. 45 Geo. III. c. 92, s. 3,^m service of a *subpœna* on a witness in one part of the United Kingdom to give evidence in a criminal prosecution in another part, is as effectual as if the witness had been served with the *subpœna* in that part of the United Kingdom where he is required to appear, and upon default notified by a certificate under the seal of the court whence the *subpœna* issued, to the Court of King's Bench *106] in England or Ireland respectively, or the High Court *of Justiciary in Scotland, he is liable to be punished as for a contempt of the process of those courts respectively. By the express provision of this statute (sect. 4,) the witness cannot be punished for default, unless the reasonable expenses of coming and attending to give evidence, and of returning, have been tendered to him.^{mm} In other cases the witness is bound to obey the writ, or to perform the condition of his recognizance, although no expenses have been tendered to him: "for the calls of justice are paramount to all private considerations and claims.^o In case of^p felony and some cases of^q misdemeanor, the legislature has made provision for the expenses of the prosecution and witnesses.

At common law, a defendant in capital cases had no means of compelling the attendance of witnesses on his behalf without a special order from the court; and if they attended voluntarily,

^m And see 13 Geo. III. c. 39, and 44 Geo. III. c. 92. The latter statute is repealed so far as relates to the apprehension of offenders escaping from Ireland into England, or from England into Ireland, and to the backing of warrants against them, by 11 & 12 Vict. c. 42, s. 21.

^{mm} The provision is confined to cases where the witness making default is out of the jurisdiction of the Court from which the certificate is transmitted. *R. v. Brownell*, 1 Ad. & Ell. 602; E. C. L. R. 28; and it does not apply to a *subpœna* from the quarter sessions. *Ib.*

ⁿ 2 Russ. on Crimes, 3rd ed. 947.

^o 2 Haw. c. 46, s. 168; 2 Hale, 292; *R. v. Cooke*, 1 Car. & P. 321; E. C. L. R. 12.

^p 7 Geo. IV. c. 64, s. 22; *Rex v. Exeter Co. Treas.* 5 M. & Ry. 167; and provision is made by 6 & 7 Will. IV. c. 89, and 7 Will. IV. & 1 Vict. c. 68, for the expenses of medical and other witnesses attending on coroner's inquests; see the statutes on this subject more fully noticed, Vol. III. tit. WITNESS.

^q 7 Geo. IV. c. 64, s. 23; and by 1 Vict. c. 44, this power is extended to cases of misdemeanour in concealing the birth of a child.

they could not be sworn.¹ But in case of misdemeanor a defendant might always take out *subpœnas* as of course.² By the stat. 7 Will. III. c. 3, s. 7, it was provided, that defendants, in cases of treason, should have the same process to compel the attendance of witnesses for them as was granted to compel witnesses to appear against them; and ever since the statute 1 Anne, st. 2, c. 9, s. 3, which provides that witnesses for the prisoner, *in cases of treason or felony, shall be sworn in the same manner as the witnesses for the Crown, and be subject to the same punishment for perjury, the process by *subpœna* is allowed to defendants in cases of felony, as well as in other instances; and consequently, as the law now stands, a witness who should refuse, after being subpœnaed to attend to give evidence for a defendant in a criminal case, would be liable to an attachment for a contempt of court.

In proceedings before justices of the peace at their quarter sessions, whose jurisdiction does not extend beyond the county for which they act, in order to procure the attendance of a witness who resides in another county the process is issued from the Crown office.³

Where magistrates are authorized by a statute to hear and determine, or to examine witnesses, they have, incidentally, authority to summon witnesses, and take the examination on oath.⁴ And by the express provisions of stat. 11 & 12 Vict. c. 42, when any indictable offence has been committed within the limits of the

¹ 2 Haw. c. 46, s. 165; *Rex v. Turner*, 6 How. St. Tr. 565; 4 Bl. Com. 359.

² 2 Haw. c. 46, s. 165.

³ 2 Haw. c. 46, s. 165.

⁴ See *R. v. Ring*, 8 T. R. 585; *Rex v. Brownell*, 1 Ad. & E. 602; E. C. L. R. 28; see also 11 & 12 Vict. c. 42, s. 16.

⁵ Lamb, 517; Dalton's J., c. 6.

¹ In Massachusetts, prisoners indicted for a *capital* offence are entitled to the Commonwealth's process to bring their witnesses into court at the Commonwealth's expense; *Commonwealth v. Williams*, 13 Mass. 501. M.

And it has always been the practice in the State Courts of Pennsylvania for a person accused to have compulsory process from a magistrate or the court for his witnesses, *before* indictment and he is entitled to it in the United States Courts under the Eighth Article of the amendments to the Constitution of the United States; *United States v. Moore*, Wallace, 23. See also, Burr's Trial, 178. Even after a conviction the defendant is entitled to a *subpœna* to compel the attendance of witnesses to prove extenuating circumstances; *The State v. Smith et al.*, 2 Bay, 62. But witnesses for a misdemeanor are not bound to attend the trial unless their fees are paid as in civil cases, but it is otherwise in prosecutions for felony; *Ex parte Chamberlain*, 4 Cow. 49. I.

jurisdiction of any justice of the peace, or when any person suspected to be within his jurisdiction, he may issue his warrant to apprehend such person, and may summon any person within his jurisdiction as a witness for the prosecution, or may, if requisite, by warrant, cause such person to be brought before him to give evidence concerning the charge; and if such person refuse to give evidence, he may commit him to prison.^v By another statute^w likewise, in all cases where justices of the peace are empowered to imprison, fine, or otherwise punish upon summary conviction; and in all cases where they are empowered upon complaint to make *108] any order for payment of *money or otherwise; if it shall appear upon oath or affirmation that any one within the justices' jurisdiction is likely to give material evidence for the prosecutor, complainant, or defendants, and will not voluntarily appear as a witness, any such justice may issue a summons and afterwards a warrant, or in certain instances a warrant only, in the same manner to appear at the time and place therein mentioned, and give evidence for the witness as is provided by 11 & 12 Vict. c. 42, where persons have committed indictable offences.

Commissioners of bankrupts may summon before them any persons whom they believe to be capable of affording information concerning the trade, dealings, or estate of the bankrupt, and in default they may order the party summoned to be apprehended. Every such witness is entitled to have his expenses tendered him.^x

The Court for Relief of Insolvent Debtors in England^y has the same power for compelling the attendance of witnesses and production of documents as the superior Courts at Westminster. That court has also the same powers as Commissioners of Bankrupts in reference to the attendance of witnesses and the production of documents in cases of insolvency arising under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, s. 5, the jurisdiction over which was transferred by the statute 10 & 11 Vict. c. 102, ss. 4, 6, and 8, to the court and the judges of the County Courts in the country.

Either of the parties to any proceeding under the recent Act^z establishing County Courts, may obtain, at the clerk's office, summonses to witnesses, with or without a clause requiring the production of writings, which are to be served by one of the bailiffs of the court; and any person so served, and to whom his

^v 11 & 12 Vict. c. 42, s. 16.

^w 11 & 12 Vict. c. 43, s. 7.

^x 12 & 13 Vict. c. 106, s. 120.

^y 1 & 2 Vict. c. 110, s. 27.

^z 9 & 10 Vict. c. 95, s. 85, 86.

expenses are tendered, and any person present in court, who shall be required to give evidence, shall pay, on default or refusal, a fine not exceeding £10.

*Witnesses also being duly summoned to attend on Courts Martial, are, by the statute 13 Vict. c. 5, s. 15, liable, on neglect to attend, or produce documents if required, to attachment in the Court of Queen's Bench, as in case of neglect to attend a trial on a criminal proceeding in that court. [*109]

In the case of a reference to arbitration by rule of court, or by a judge's order or agreement to make the submission a rule of court, the court making such rule or order, or any judge, may direct the attendance of a witness to be examined before the arbitrator, or the production of any document, by the statute 3 & 4 Will. IV. c. 42, s. 40.

Commissioners of inclosure, and assistant commissioners under the statute, have power to summon by writing any person within a certain distance to appear before them to be examined, or by summons under the seal of the commissioners to appear before any valuer; and in each case to produce documents; and if the party summoned refuse to appear, or to produce documents, having had his reasonable expenses tendered, he will be guilty of a misdemeanor.* And similar powers to require attendance of persons and production of documents are given to the Tithe Commissioners by summons, under hand only, by 6 & 7 Will. IV. c. 71, s. 6.^b And to the Poor-Law Commissioners by summons under hand and seal by 4 & 5 Will. IV. c. 76.

Where either party cannot safely proceed to trial on account of the absence of a material witness, the proper course is to move the court in term time, or to apply to a Judge in vacation, or the judge at the sittings, on a proper affidavit, to put off the trial, which he allows or not at his discretion.^c

*Where a witness is resident abroad, or is going abroad, the proper course is to apply to the court to have him [*110]

^a 8 & 9 Vict. c. 118, ss. 9, 164.

^b See 10 & 11 Vict. c. 104.

^c *Turner v. Merryweather*, 7 C. B. 251; E. C. L. R. 62. But this application will not be granted at the instance of the plaintiff, unless in the case perhaps of a trial by proviso, because he may withdraw his record; but when, in consequence of some sudden indisposition or accident, a witness is unable to attend, but is likely to be able to do so before the sittings are over, the judge will usually make an order that the cause shall stand over. *Ansley v. Birch*, 3 Camp. C. 333.

examined out of court, *vivâ voce*, or on interrogatories. So, where it is apprehended that, from illness, a witness may not be able to attend the trial.^b

Where an instrument is in the hands of a third person, the production is compelled by means of a writ of *subpœna duces tecum*.^c By this writ the witness is compellable, to produce all documents in his possession, unless he have a lawful or reasonable excuse to the contrary.^d Of the validity of the excuse the court, and not the witness, is to judge.^{e1} As every man, in furtherance of justice, is bound to disclose all the facts within his knowledge which do not
*111] *also bound to produce such documents as are essential to the discovery of truth and the great ends of justice. But as he is

^b *Infra*, WRITTEN EVIDENCE.—Index, tit. EXAMINATION ON INTERROGATORIES.

^c From the entries cited in the case of *Amey v. Long*, 9 East, 473, it appears that this writ has in fact been used from the time of Charles the Second; but so necessary is the power of compelling the production of documents in the possession of third persons, that the means of doing it must have been coeval with the courts of law.

The statutes 11 & 12 Vict. c. 42. and 11 & 12 Vict. c. 43, do not make any provision for enforcing the production of documents, and it has been decided that a summons of a justice requiring a party possessed of documents to attend as a witness and produce them is not equivalent to a *subpœna duces tecum*: *R. v. Inhabitants of Orton*, 7 Q. B. 120; E. C. L. R. 53. But on an application before magistrates at petty sessions, a *subpœna ad testificandum*, and a *subpœna duces tecum*, may issue from the Crown office, and disobedience will be punished by Q. B. with attachment; *R. v. Greenway*, 7 Q. B. 126; E. C. L. R. 53; *R. v. Carey*, *ibid.* 131. The Court of Bankruptcy may require any person summoned before them to give information concerning the bankrupt and his dealings, to produce any documents in his custody or power which the Court may think necessary; 12 & 13 Vict. c. 106, s. 120. The powers of the Insolvent Court, of the County Courts, and of Arbitrators, Commissioners of Inclosure, Tithe and Poor-Law Commissioners to procure the production of documents have already been mentioned, *ante*, pp. 108, 109.

^d *Amey v. Long*, 9 East, 473.

^e *Amey v. Long*, 9 East, 473; *Field v. Beaumont*, 1 Swans. 209.

¹ A witness may be compelled, under a *subpœna duces tecum* to produce a document in his possession, unless he has a lawful or reasonable excuse for withholding it, although the production of it will adversely affect his pecuniary interest; *Bull v. Loveland*, 10 Pick. 9. The court and not the witness is to judge of the reasonableness of his excuse; *Ibid. Chaplain v. Briscoe*, 5 Smedes & Marshall, 198. A *subpœna duces tecum* was served on a witness, who attended but did not produce on the trial the papers specified, nor show a good reason why he did not. *Held*, that he was liable to the aggrieved party for all the damages sustained in consequence of his disobedience; *Lane v. Cole*, 12 Barb. 680.

protected from answering questions, the answers to which may subject him to penal responsibility, so he is not compellable to produce any document in his possession, where the production would be attended with similar consequences.^f

There is, however, in one respect, a distinction between compelling a witness to answer a question orally, and obliging him to produce a written document. He must answer questions, although the answer may render him civilly responsible; but he is not compellable to produce title-deeds, or any other documents which belong to him, where the production might prejudice his civil rights.¹ And this is, as it seems, a rule of legal policy founded upon a consideration of the great inconvenience and mischief to individuals which might and would result to them from compelling them to disclose their titles, by the production of their title-deeds or other private documents. But this rule does not extend beyond the evidences of title.^g

^f See *Whitaker v. Izod*, 2 Tant. 115; and *The King v. Dixon*, 3 Burr. 1687.

^g *Doe dem. Earl of Egremont v. Date*, 3 Q. B. 609; E. C. L. R. 43. This case arose on the trial of an ejectment by a party claiming the reversion against a lessee. The plaintiff to prove seisin in *G.*, a late tenant for life, called his executor, and required him to produce a book containing an entry forty years old of a receipt of rent for the land in question by *G.*'s steward. It was admitted that the executor, as legatee of large personal property under the will of the tenant for life, would be liable over to the defendant if the plaintiff obtained a verdict under *G.*'s covenant for title, and that the action was substantially defended by the executor. But it was held that the executor was bound to produce the book. Though the person declining to produce the document cannot be compelled to state the contents, yet he must disclose the date, and the names of the parties, in order to identify it. *Doe dem. Loscombe v. Clifford*, 2 C. & K. 448; E. C. L. R. 61.

¹ The *subpoena duces tecum* is not a process of course; thus it will not be issued to a public officer to bring original papers into court, when certified copies would be evidence; *Delany v. The Regulators*, 1 Yeates, 403. Nor to the printer of a newspaper to produce certain of his newspapers in court; *Shippen v. Wells*, 2 Yeates, 260. And it seems that the Governor of the State cannot be compelled to produce a communication sent to him respecting the character of a public officer; *Gray v. Pentland*, 2 Serg. & R. 23. So a cashier of a bank is not bound to produce the books of the bank on this writ, in a case where the bank is a party; *Utica Bank v. Hilliard*, 5 Cow. 153, 419.

Semble, a witness cannot thus be compelled to produce a paper which would criminate himself; *United States v. Reyburn*, 6 Pet. 367. A witness may however be compelled, under a *subpoena duces tecum* to produce a document in his possession, unless he has a lawful or reasonable excuse for withholding it, although the

The same principle applies where the document is in the hands of an attorney: he will not be compelled to *produce it to be read where the disclosure would be prejudicial to his client,^b and when he is protected from producing it, he cannot be forced to divulge its contents.ⁱ But the latter privilege is confined to an attorney or his representative, and, therefore, although an agent, not being an attorney, or his clerk, may not be compellable to produce the deeds of his principal, (a party in the cause,) yet he is liable, on declining to produce them, to be examined as to their contents.^{k1}

Where these objections do not apply, it seems that the writings in a man's possession are as much liable to the calls of justice as the faculties of speech and memory are. There can be no difference in principle between obliging a man to state his knowledge of a fact, and compelling him to produce a written entry in his possession which proves the same fact. Not only a man's estate, but even his liberty or life, may depend upon written evidence, which is the exclusive property of a stranger. If the Court think that, upon principles of justice and equity, the production ought not to be enforced, secondary evidence may be given.

It is in all cases the duty of the witness to bring the document

^b *Copeland v. Watts*, 1 Stark. C. 95; E. C. L. R. 2. See further on this subject, Vol. II. tit. CONFIDENTIAL COMMUNICATION; *R. v. Woodley*, 1 M. & Rob. 390; *R. v. Upper Boddington*, 8 D. & R. 726; E. C. L. R. 16.

ⁱ *Davies v. Waters*, 9 M. & W. 608; *Hibberd v. Knight*, 2 Exch. 11; *Newton v. Chaplin*, 19 L. J., N. S., C. P., 374.

^k *Earl of Falmouth v. Moss*, 11 Pri. 455.

production of it will adversely affect his pecuniary interest; of the lawfulness or reasonableness of such excuse, the court and not the witness is to judge; *Bull v. Loveland*, 10 Pick. 9.

A security in a sheriff's bond was compelled to produce the books of his principal (who had died insolvent) on a *subpœna duces tecum*, notwithstanding he was apprehensive of danger to himself from the production in the way of suits upon the bond; *Hawkins v. Sumpter*, 4 Dess. 446. But this *subpœna* cannot be issued to the attorney of the party whose cause is on trial and received the papers confidentially in that character; *Durkee v. Leland*, 4 Verm. R. 612. G.

¹ *Jackson v. Bustis*, 14 Johns. 391; *Lynde v. Judd*, 3 Day, 499; *Durkee v. Leland*, 4 Verm. 612.

He may prove the existence of such papers and that they are in his possession, so as to enable the party to give secondary evidence of their contents; *Rhoads v. Selin*, 4 Wash. C. C. 718; *Brundt v. Klein*, 17 Johns. 335; *Jackson v. McVey* 18 Johns. 330. See *McPherson v. Rathbone*, 7 Wend. 216.

with him, according to the exigency of the writ;¹ and it is a question of law for the court, whether, upon principles of justice and equity, the production of the instrument ought to be enforced.^m Disobedience of the writ by the witness will not warrant the reception of parol evidence; but where the witness *in fraud of the subpoena*, had transferred the document to the adverse party [^{*113} in the cause, it was held that parol evidence was admissible.ⁿ Of course it is not admissible when the *subpoena* was served too late.^o

Where the instrument is in the hands of the adverse party timely notice should be given to produce it.^p

As a witness is bound to attend in court in obedience to the writ, so is he under an obligation to be sworn and give evidence on his appearance. And if a witness for the Crown refuse to be sworn, he is guilty of a contempt of court, and may be fined, and committed till he has paid the fine.¹ A person who happens to be in court, may, in a criminal case, be compelled to give evidence, although he has not been bound by recognizance, or served with a *subpoena* as a witness.^r

The law protects a witness, as well as a party to the suit, from arrest, *eundo, morando et redeundo*.^{s1} And it is not essential to his protection that the witness should have been subpoenaed, if he has consented to attend.⁵ The courts usually allow ample time for

¹ *Amey v. Long*, 9 East, 473; *Corsen v. Dubois*, 1 Holt's C. 239; E. C. L. R. 3; *Field v. Beaumont*, 1 Swanst. 209; *Reed v. James*, 1 Stark. C. 132; E. C. L. R. 2.

^m *Copeland v. Watts*, 1 Stark. C. 95; E. C. L. R. 2; *Corsen v. Dubois*, 1 Holt, C. 239; E. C. L. R. 3; *Reed v. James*, 1 Stark. C. 132; E. C. L. R. 2.

ⁿ *Leeds v. Cook et ux.*, 4 Esp. C. 256.

^o *Hibberd v. Knight*, 2 Ex. 11.

^p *Doe d. Wartney, v. Grey*, 1 Stark. C. 283; E. C. L. R. 2.

^q *Lord Preston's case*, Salk. 278. Lord Preston was committed by the Court of Quarter Sessions for refusing to be sworn before the grand jury on an indictment for high treason. But a witness may refuse to be sworn in a civil case if his expenses have not been paid.

^r *R. v. Sadler*, 4 C. & P. 118; E. C. L. R. 19.

^s *Meekins v. Smith*, 1 H. B. 636; *Lightfoot v. Cameron*, 2 Bl. 1113; *Randall v. Gurney*, 3 B. & A. 252; E. C. L. R. 23.

^t *Spence v. Stuart*, 3 East, 89; *Kinder v. Williams*, 4 T. R. 377; *Arding v. Flower*, 8 T. R. 534; *Ex parte Byne*, 1 Ves. & B. 316; *Meekins v. Smith*, 1 H. B. 636.

¹ If a witness privileged from arrest be nevertheless arrested, and do not insist on his privilege, but give a bond for the prison-bonds, such bond is neither void nor voidable—the privilege is waived; *Tipton v. Harris*, Peck's Rep. 414. G.

this purpose.^u The same indulgence has been extended to a witness attending an arbitrator under an order of *Nisi Prius*;^x *114] and *to a petitioning creditor,^u a bankrupt, or witness attending a meeting of commissioners;^v a witness attending the execution of a writ of inquiry,^w the Insolvent Debtors' Court,^x and a Court Martial under the Mutiny Act.¹

^u 13 East, 16, n. (a); *Willingham v. Matthews*, 6 Taunt. 356; E. C. L. R. 1; *Lightfoot v. Cameron*, cited in 2 Bl. 1113; *Hatch v. Blisset*, Gilb. Cas. 308; cited in *Holliday v. Pitt*, 2 Str. 986; *Strong v. Dickenson*, 1 M. & W. 488; *Randall v. Gurney*, 3 B. & Ald. 252; E. C. L. R. 5.

^x *Spence v. Stuart*, 3 East, 89; *Moore v. Booth*, 3 Ves. 350; *Randall v. Gurney*, 3 B. & Ald. 252; E. C. L. R. 5; *Rishton v. Nisbett*, 1 M. & Rob. 347; *Webb v. Taylor*, 1 Dow. & L. 676.

^{uu} *Selby v. Hills*, 1 Dowl. P. C. 257.

^v *Spence v. Stuart*, 3 East, 89; *Arding v. Flower*, 8 T. R. 534; *Kinder v. Williams*, 4 T. R. 377; *Ex parte Byne*, 1 Ves. & B. 316.

^w *Walters v. Rees*, 4 Moore, 34; E. C. L. R. 16.

^x *Willingham v. Matthews*, 6 Taunt. 356; E. C. L. R. 1.

¹ And to a witness attending before a magistrate to give his deposition under a rule of court; *The United States v. Edmé*, 9 Serg. & R. 147. I.

The privilege of a witness does not extend throughout the term at which the case is marked for trial; nor is he protected while engaged in transacting his private business, after he is discharged from the obligation of his subpoena; *Smythe v. Banks*, 4 Dallas, 329. But he is protected while at his lodgings, as well as while going to or returning from court; *Hurst's case*, 4 Dallas, 487. And a witness from another State is entitled to the same privilege as a citizen of the State where the court sits; *Norris v. Beach*, 2 Johns. 294; *Sandford v. Chase*, 3 Cow. 381.

It was held by Washington, J., in the Circuit Court of the United States for the third circuit in New Jersey, that the privilege of a witness extends only to an exemption from arrest, and does not render illegal the service of a summons upon him, unless he be in the immediate presence of the court; *Blight's Ex. v. Fisher et al.*, 1 Peters' Rep. 41. The contrary however has been held by the Supreme Court of New Jersey; *Halsey v. Sterrard*, 1 Southard's Rep. 366.

The protection which the law gives to a witness, is a personal privilege, of which he may avail himself to prevent or defeat an arrest; but if he waive the privilege and willingly submit to custody, he cannot afterwards object to the imprisonment as unlawful; *Brown v. Gitchell*, 11 Mass. 11.

A writ of protection is often sued out for a witness; but it is of no use except to give notice to the officer,—being no protection to one who is not legally entitled to it; *Ex parte McNeil*, 6 Mass. 264. The common remedy when a witness or party is arrested, while *bona fide* attending to a cause which requires his attendance, is by motion to the court to be discharged from custody. But in New York, he will not be discharged without notice to the plaintiff. A rule to show cause, however, will be granted and proceedings stayed in the mean time; *Grover v. Green*, 1 Caine's Rep. 115.

But a witness is not protected from being taken by his bail,⁷ for this is not an arrest,² but a retaking; and he may also be arrested on criminal process.

II. *Objections in exclusion of the testimony of witnesses.*

It has already been seen that a witness may be incompetent, because he is incapable of religious obligation from youth, mental infirmity,^a ignorance, or unbelief.

The objection arising from the ignorance or unbelief of the witness, ought, in its natural course, to be taken before the witness is sworn, because it assumes that he is *incapable* of being bound by an oath. Indeed any objection to competency ought to be taken in the first instance, and before the witness has been examined in chief; for otherwise it would afford an unfair advantage to the other party, who would avail himself of the testimony of the witness, if it were favourable, but would *get rid of it by raising the objection, if it turned out to be adverse. And [*115 therefore, where, upon a trial for high treason, it appeared, after a witness had been examined without objection on the part of the prisoner, that he had been misdescribed in the list of witnesses, which is required by the statute to be given to the prisoner previous to his trial, the court would not permit the evidence of that witness to be struck out.^b And so when the incompetency of a witness appeared on the face of his answers to interrogatories, it was held that the objection was waived by putting cross interrogatories, and could not be insisted on at the trial.^c It has, however, been held, that if it be discovered at any stage of the trial that a witness is so interested as to be incompetent, his evidence may be struck out;^d but this, it seems, is to be understood of those cases

⁷ *Ex parte Lyne*, 3 Stark. C. 132; E. C. L. R. 3.

² Per Richards, C. B., *Horn v. Swinford*, 1 D. & R. 20; E. C. L. R. 16.

^a One who is born deaf and dumb may, if he have sufficient understanding, give evidence by means of an interpreter; *R. v. Ruston*, 1 Leach, C. C. 408: or by writing if able; *Morrison v. Lennard*, 3 C. & P. 127; E. C. L. R. 14. Lunatics are competent during lucid intervals. Com. Dig. tit. Testmoigne, A, 1. And a person suspected to be insane may be examined on the *voir dire* to show his state of mind; see *Att.-Gen v. Hitchcock*, 1 Ex. 95.

^b *R. v. Watson*, 2 Stark. C. 158; E. C. L. R. 3.

^c *Ogle v. Paleski*, Holt, C. 485; E. C. L. R. 3.

^d *Turner v. Pearte*, 1 T. R. 720; *Howell v. Lock*, 2 Camp. 14; *Perigal v. Nicholson*, 1 Weightw. 64; *Beeching v. Gower*, Holt's C. 313; E. C. L. R. 3; *Stone v. Blackburn*, 1 Esp. C. 37; *Morish v. Foote*, 2 Moore, 508; E. C. L. R. ; 8 Taunt. 454; E. C. L. R. 4; *Jacobs v. Laybourn*, 11 M. & W. 685.

only where the objection could not have been taken in the first instance.¹ The practice formerly was when an objection was made to the competency of a witness, to make it before he was sworn in chief, and to swear and examine him, where his incompetency was supposed to arise from interest, on the *voir dire*; and after a witness had been examined in chief, the objection could no longer be taken.² But the same strictness is not observed in modern practice: at least with respect to objections to witnesses on the ground of interest.³

Before a witness takes the oath, he may be asked whether
 *116] he believes in the existence of a God, in the obligation of an oath, and in a future state of rewards and punishments; and if he does, he may be admitted to give evidence.⁴ And it seems that he ought to be admitted if he believes in the existence of a God who will reward or punish him in this world, although he does not believe in a future state.⁵ But it is not sufficient

¹ *Morish v. Foote*, 2 Moore, 508; E. C. L. R. 4; 8 Taunt. 454; E. C. L. R. 4; *Felingham v. Sparrow*, 9 Dowl. P. C. 141; but see *Jacobs v. Laybourn*, *contra*.

² *Lord Lovat's case*, 10 How. St. Tr. 506.

³ *Turner v. Pearte*, 1 T. R. 720; *Jacobs v. Laybourn*, 11 M. & W. 685; *Yardley v. Arnold*, 10 M. & W. 141; and see further on this topic; *post*.

⁴ *R. v. Taylor*, Peake's N. P. R. 11. A negro called as a witness stated, before he was sworn, that he was a Christian, and had been baptized; and it was held that he ought to be sworn, and asked no further questions before he took the oath; *R. v. Serva*, 2 C. & K. 53; E. C. L. R. 61.

⁵ See the judgment of Willes, C. J., in *Omichund v. Barker*, Willes, 550; 1 Atk. 21; 1 Wils. 84.

¹ A witness incompetent by reason of interest must be objected to before he is sworn, if such interest is known then to the objector; *Donelson v. Taylor*, 8 Pick. 390; *Stuart v. Lake*, 33 Maine, 87.

If in the course of a witness' examination however he appears from his own answers to be incompetent, the party against whom the evidence is given should move to strike out the testimony; *Sims v. Givan*, 2 Blackford, 461; *Heely v. Barnes*, 4 Denio, 73; *Scott v. Jester*, 8 English, 437; *Morton v. Beall*, 2 Har. & Gill, 136; *Lester v. McDowell*, 6 Harris, 91. In chancery when a party has cross-examined the witness, and no exception to his testimony is made until the hearing of the cause, the objection will be considered as waived; *Barrow v. Rhinelander*, 1 Johns. Ch. Rep. 550; *Town v. Needham*, 3 Paige Ch. Rep. 546.

² The weight of authority in the United States is very decidedly with the text on this point. If however any sanction be required beyond the temporal penalties affixed to the crime of perjury—very inadequate if we consider that the oath of the witness can only be met in a criminal proceeding by the oaths of two witnesses, or what is equivalent thereto—those which may be observed to follow such crimes in this world will hardly be sufficient to overbear any strong temptation to

that he believes himself bound to speak the truth, merely from a regard to character, or the interests of society, or fear of punishment by the temporal law.¹

The most correct and proper time for asking a witness whether the form in which the oath is about to be administered to him is one that will be binding on his conscience, is before that oath is administered. But although a witness shall have taken the oath in the usual form without making any objection, he may, nevertheless, be afterwards asked whether he considers the oath he has taken to be binding on his conscience. But if the witness answer in the affirmative, that he does consider the oath which he has taken to be binding upon his conscience, he cannot then be further asked whether there be any other mode of swearing that would be more binding upon his conscience than that which has been used.^m

*In criminal cases, where a person of tender years is a material witness, it is usual for the court to examine the [117 witness as to his competency to take an oath before he goes before the grand jury. And if such a witness be found incompetent for want of proper instruction, the court will, in its discretion, put off the trial, in order that the party may in the mean time receive such instruction as will qualify him to take an oath. Neither the testimony of the child without oath, nor evidence of any statement which he has made to any other person, is admissible."¹

¹ *R. v. Ruston*, Leach, C. C. L. 455.

^m *The Queen's case*, 2 B. & B. 284; E. C. L. R. 6. According to the opinion of the judges, as delivered by Abbott, C. J., in answer to questions proposed by the Lords: Abbott, C. J., after delivering this opinion, added, "Speaking for myself (not meaning thereby to pledge the other judges, though I believe their sentiments concur with my own), I conceive, that if a witness says he considers the oath as binding upon his conscience, he does in effect affirm, that in taking that oath he has called God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance upon his head if what he shall afterwards say is false; and having done that, it is perfectly unnecessary and irrelevant to ask any further questions." And see *Sells v. Hoare*, 7 Moore, 36; E. C. L. R. 17; 3 B. & B. 232; E. C. L. R. 7.

ⁿ *Brazier's case*, Leach, C. C. L. 237; *R. v. Tucker*, 1 Phill. on Ev. 9th ed. 6; *R. v. Nicholas*, 2 C. & K. 46; E. C. L. R. 61; per Pollock, C. B.: "Where commit them. That the belief must be in a future state are the cases of *Atwood v. Welton*, 7 Conn. 66; *Commonwealth v. Bachelor*, 4 Am. Jurist, 81.

Contra, *Hunscom v. Hunscom*, 15 Mass. 184; *Farnandis v. Henderson*, S Car. Law Journal, 202; *Noble v. People*, Breese, 29; *Blocker v. Burness*, 2 Alabama, 354; *Brock v. Milligan*, 10 Ohio, 121; *U. States v. Kennedy*, 3 McLean, 175; *Blair v. Seaver*, 2 Casey, 274; *Bennett v. The State*, 1 Swan, 411.

¹ A deaf and dumb person capable of relating facts correctly by signs, may give

It has already been observed that, until recently, if a person had been convicted of an offence which is inconsistent with the common principles of honesty and humanity, the law considered his oath to be of no weight, and excluded his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice, to affect the property or liberty of others. It has, however, been thought by the legislature that the inquiry after truth in courts of justice was often obstructed by these incapacities, and that it is *desirable that full information as to the facts in issue should

*118] be laid before the persons who are appointed to decide upon them; and that they should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony.^o It has therefore been enacted^p that "no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime, from giving evidence either in person or by deposition, but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person offered as a witness may have been previously convicted of any crime or

the infirmity arises from no neglect, but from the child being too young to have been taught, I doubt whether the loss in point of memory would not more than countervail the gain in point of religious education. Still I can easily conceive that there may be cases where the intellect of the child is much more ripened, as in cases of children of nine, ten, or twelve years old, when their education has been so utterly neglected that they are wholly ignorant on religious subjects. In these cases a postponement may be very proper." In this case the child was six years old, and postponement was refused. And where before the happening of the facts to be proved by the child, there had been an absence of all religious education, and the child had only been instructed with a view to being examined, but at the trial showed no real understanding on the subject of religion or a future state, the judge refused to allow him to be examined; *R. v. Williams*, 7 Car. & P. 320; E. C. L. R. 32; *R. v. Pitre*, 3 Car. & P. 598; E. C. L. R. 14.

^o See recital 6 & 7 Vict. c. 85.

^p 6 & 7 Vict. c. 85.

evidence by signs through the medium of an interpreter, though it appear that such person can read and write, and communicate ideas imperfectly by writing; *The State v. De Wolf*, 8 Conn. 93. G. See *Snyder v. Native*, 5 Blackf. 295.

Whether a witness is intoxicated at the time of giving testimony and therefore incompetent is a matter within the sound discretion of the court; *Gould v. Crawford*, 2 Barr, 89.

As to the competency of witnesses see Anon. 2 Pennington, 930; *Van Pelt v. Van Pelt*, Ibid. 657; *Den v. Vancleve*, 2 Southard, 589; *State v. Leblanc*, Const. Rep. (S. C.) 354; *Commonwealth v. Hutchinson*, 10 Mass. 225.

offence." The law upon the subject of the objection to competency on the ground of infamy has thus been rendered obsolete, and, save as a matter of historical information, useless.¹

The general principle which operated to the exclusion of an interested witness has already been noticed. In order to obtain a correct understanding of the present law upon this subject, it is necessary to advert to the old rule, and to trace its gradual restric-

¹ It is the crime and not the punishment which creates the infamy and destroys the competency of the witness; *The People v. Whipple*, 9 Cow. 707. A conviction without an attainder does not destroy the competency of a witness; *Skinner Perot*, 1 Ashmead, 57. See also *Cushman v. Loker*, 2 Mass. R. 108. But conviction of an infamous crime in a foreign country, or in any other of the United States does not render the subject of such conviction an incompetent witness in the courts of Massachusetts; *Commonwealth v. Green*, 17 Mass. R. 515. Nor in Maryland; *Cole v. Cole*, 1 Har. & Johns. 572; *Clark v. Hall*, 2 Har. & McHen. 378; *State v. Ridgely*, Ib. 120. Nor in North Carolina; *State v. Candler*, 3 Hawks, 393. But the record is admissible in Massachusetts to affect his credit; *Commonwealth v. Knapp*, 9 Pick. 497. Parol evidence of the conviction is inadmissible in New York to establish the incompetency, although it be proved that the clerk's office of the county had been burnt down and the record probably destroyed; for there is higher evidence of the fact capable of being produced, that is, the transcript delivered into the Court of Exchequer by the District Attorney, which must be presumed to have been delivered according to his duty; *Hilts v. Colvin*, 14 Johns. R. 182. So it is in general inadmissible in Massachusetts; *Commonwealth v. Green*, 17 Mass. R. 515.

Even the admission of the witness will not suffice to prove the alleged infamy, without the record of the judgment as well as the conviction; *The People v. Whipple*, 9 Cow. 707. But parol evidence to this point is held to be admissible in Louisiana; *Castellano v. Peillon*, 2 Martin, N. S. 466. And Maryland; *Cole v. Cole*; *Clark v. Hall*; *State v. Ridgely*, supra. G.

In New Hampshire a conviction of a crime in another State is not admissible in evidence for the purpose of impeaching the credit of a witness. But a conviction in another State of a crime which, by the laws of such State, disqualifies the party from being heard as a witness, and which, if committed in New Hampshire, would have operated as a disqualification is sufficient to exclude him from testifying there, in the same manner as if it had been committed and the conviction had taken place in their jurisdiction; *Chase v. Blodgett*, 10 N. Hamp. 22. See *Uhl v. Commonwealth*, 6 Grattan, 706; *Campbell v. The State*, 23 Alabama, 44.

As to what crimes are infamous see *State v. Keyes*, 8 Vermont, 57; *Koller v. Firth*, 2 Pennington, 723; *The Commonwealth v. Rogers*, 7 Metcalf, 500; *Commonwealth v. Keith*, 8 Metc. 531; *Carpenter v. Nixon*, 5 Hill, 260; *Free v. The State*, 1 McMullan, 494; *Deer v. The State*, 14 Missouri, 348; *Commonwealth v. Dane*, 8 Cushing, 384; *Houghtaling v. Kelderhouse*, 1 Parker C. R. 241; *Poage v. The State*, 3 Ohio, (N. S.) 229; *Lyford v. Farran*, 11 Foster, 314; *State v. Randolph*, 24 Conn. 363.

tion, until it has been reduced to the few exceptions contained in the recent statute.

The old rule upon this subject was, that the interest must be some^a legal, certain, and immediate interest, *however
*119] minute, in the *result* of the cause, or in the *record* as an instrument of evidence, acquired without fraud.¹

Where actual gain or loss would result, simply and immediately from the verdict and judgment, the witness was deemed incompetent by reason of his interest; as, where he was a party, though but a nominal party, to the suit; or was a party in beneficial interest; or *quasi* a party, from having entered into a rule of court

^a See *Bent v. Bakes*, 3 T. R. 27; 2 Smith, L. C. 39; *R. v. Whiting*, 1 Salk. 283; *R. v. Boston*, 4 East, 572; *R. T. Hardw.* 572; *Humphreys v. Miller*, 4 Car. & P. 7; E. C. L. R. 19; *R. v. Walker*, 1 Ford. MSS. 145; *Parker v. Whitby*, 1 Turn. & R. 362; *Giles v. Smith*, 1 Moo. & R. 443; *Wishaw v. Barnes*, 1 Camp. 341; *Smith v. Harris*, 2 Stark. C. 47; E. C. L. R. 3; *De Rone v. Fairlie*, 1 Moo. & R. 457; *Doe v. Clarke*, 3 Bing. N. S. 429; E. C. L. R. 32; *R. v. Cole*, 1 Esp. C. 169; *Powel v. Gordon*, 2 Esp. C. 735; *Forrester v. Pigou*, 1 M. & S. 9; E. C. L. R. 28; *Fotheringham v. Greenwood*, 1 Str. 129; Salk. 283; Lord Raym. 724; *Champion v. Atkinson*, 3 Keb. 90; *Company of Gold and Silver Wire drawers v. Hammond*, Ford's MSS.; *R. v. Bray*, R. T. Hardw. 360; 1 T. R. 300; 3 T. R. 32; Co. Litt. 6; 1 Keb. 836; *Bent v. Baker*, 2 T. R. 27; *Smith v. Prager*, 7 T. R. 60; *Abrahams v. Bunn*, 4 Burr. 2251; and see *Masters v. Drayton*, 2 T. R. 496; *Carter v. Pearce*, 1 T. R. 163; *R. v. Boston*, 4 East, 572; *Needham v. Law*, 12 M. & W. 560.

^r As in the case of guardian of a minor, or governor of the poor, who is in the first instance liable to costs; *R. v. St. Mary Magdalen*, 3 East, 5. Trustees empowered as a public body to sue and to be sued in the name of their treasurer, but to be deemed the plaintiffs, were not, it seems, competent witnesses for the plaintiff in an action so brought; *Whitmore v. Wilks*, M. & M. 214; E. C. L. R. 22; and 3 C. & P. 364; E. C. L. R. 14.

^a It will be presumed that the action is brought by the direction of the party beneficially interested. In an action on a policy of insurance, brought in the names of the brokers, it appeared that A., one of the parties for whose benefit the policy was effected, had before the action released to the plaintiffs all actions which he might have under the policy, and also that since the action two persons to whom the whole interest on the policy had been assigned, had, under an order of the Court of C. P., indemnified the plaintiff against all costs, and A. was tendered and examined as a witness for the plaintiffs on the trial: held, on error, that as the action had been brought in the names of the brokers for A.'s benefit, it

¹ But a person interested in the event is competent, when called on to give testimony contrary to his interest; *Jackson v. Fredenburgh*, 1 Johns. R. 159. A witness interested to diminish certain admitted items, in the plaintiff's account, is still a competent witness to disprove other items; *Smith v. Carrington*, 4 Cranch 62. G.

or contract that another cause, to which he was party, should abide the same result with that in which he proposed to give evidence;⁶ and, indeed, wherever the direct effect of the executed judgment, as contradistinguished from its efficacy in establishing or evidencing any other right or claim, or for any other collateral purpose, would be to produce some benefit, or work some [*120 prejudice to the proposed witness.^u

The next class of cases was where the witness was so situated that a legal right or liability, or discharge from liability,^x would immediately result. As where the witness had indemnified a party against the result generally;^y or was bail for the defendant;^z or was a copartner with him in the subject-matter of the suit, and would be liable to contribution in case the defendant failed in his defence.^a

It seems that, in general, where a witness was *prima facie* liable to the plaintiff in respect to the cause of action for which he sued,

must, until the contrary be shown, be presumed it was brought by him and by his authority, and if so, he became and remained still liable to the attorney employed to bring it, nothing having been done to deprive the attorney of his rights to recover costs from him; he was therefore improperly admitted to give evidence, and a *venire de novo* was awarded: *Bell v. Smith*, 5 B. & C. 188; E. C. L. R. 11.

^u *Forrester v. Pigou*, 1 M. & S. 9.

^x *Marleys v. Drayton*, 2 T. R. 496; *Fardley v. Arnold*, 10 M. & W. 141; *Rigby v. Walthew*, 5 Dowl. 527.

^y *Bland v. Ansley*, 2 N. R. 331. In replevin by an under-tenant against a landlord, who, towards discharging the rent due from his tenant, distrained as bailiff of his tenant for the amount of rent due from the under-tenant to the tenant: it was held, that the tenant was not a competent witness to prove the amount of rent due from the under-tenant; *Upton v. Curtis*, 1 Bing. 210; E. C. L. R. 8; *Hartshorne v. Watson*, 4 Bing. N. C. 477; E. C. L. R. 33; *Wedgworth v. Hartley*, 10 A. & E. 619; E. C. L. R. 37.

^z See *infra*, p. 121, note (e).

^a 1 T. R. 164; *Bayley v. Hole*, 3 Car. & P. 560; E. C. L. R. 14; *Piesly v. Von Esch*, 2 Esp. C. 605; *Pearcy v. Fleming*, 5 Car. & P. 503; E. C. L. R. 24.

^a *Hall v. Cecil and Rex*, 6 Bing. 181; E. C. L. R. 19; *Simons v. Smith*, 1 Ry. & M. 29; E. C. L. R. 21; *Cheyne v. Koops*, 4 Esp. C. 112; *Evans v. Yeatherd* 2 Bing. 133; E. C. L. R. 9. So where a co-defendant in assumpsit let judgment go by default, he was an incompetent witness for his co-defendant; *Brown v. Brown*, cited by Dallas, J., 8 Taunt. 141; E. C. L. R. 4; and see the observations in *Mant v. Mainwaring*, 8 Taunt. 139; E. C. L. R. 4.

Where two partners being sued on a bill as indorsees, one pleaded his discharge by bankruptcy and certificate, and a *non-pros.* was entered as to him; it was held, that he was an admissible witness for his co-defendant; *Aftalo v. Fourdrinier*, 6 Bing. 306; E. C. L. R. 19; and see *Moody v. King and Porter*, 2 B. & C. 558; E. C. L. R. 9.

he was not a competent witness for the plaintiff to prove the defendant's liability. For his evidence tended to produce payment or satisfaction to the plaintiff at another's expense; and the proceeding and recovering against another would afford strong, if not *conclusive evidence against the plaintiff in an action against *121] the witness. Thus it was held, that where the witness was *prima facie* liable to the vendor of goods which he had purchased in his own name, he was not a competent witness for the vendor against a third person to prove that the defendant was either solely^b or jointly^c liable for the goods; for in such case the witness had a direct interest in causing another, either to pay or contribute to the payment of the debt.^{d1} So where a witness called by the defendant had undertaken to indemnify him against the whole or part of the damages or costs.^e And a principal was not a competent witness for his surety.^f

So where the issue involved any breach of duty, or default, in respect of which the witness would be liable over to the party calling him. Such a witness, for whichever party called, was obviously interested in protecting himself against the consequences of failure, by procuring a verdict to pass for the party who called him. Although guilty of misconduct, the record would conclusively show that the party calling him had received no prejudice, so far as that cause was concerned. If called for the defendant, he would also be interested in obtaining a verdict for him, and to exclude a record, which would be evidence against himself as to the amount of consequential damage in an action afterwards brought against him by his party.

^b *Macbrain v. Fortune*, 3 Camp. 317.

^c *Ripley v. Thompson*, 12 Moore, 55; E. C. L. R. 22.

^d *Hodson v. Marshall*, 7 C. & P. 16; E. C. L. R. 32.

^e Where several parishioners at a vestry signed a resolution, approving of law proceedings against surveyors of the highways, and guaranteeing to the plaintiff the legal expenses; held that it was a personal liability, and rendered them incompetent; *Heudebourck v. Langley*, 3 C. & P. 556; E. C. L. R. 14; *Edmonds v. Lowe*, 8 B. & C. 407; E. C. L. R. 15.

^f *Secus* where the principal had been discharged by his bankruptcy and certificate; *Moody v. King*, 2 B. & C. 559; E. C. L. R. 9; see *Townend v. Downing*, 14 East, 565.

¹ Where A., an agent, whose principal B. is unknown at the time of the transaction, deals with and makes a contract of sale in his own name with C.; in an action by C. against B. on such contract, A. is not a competent witness for the plaintiff to prove the agency and the contract without a release from C.; *Hickling v. Fitch*, 1 Miles, 208; *Christy v. Smith*, 23 Vermont, 663.

Where the party employed was the actual agent who [*122 *transacted the business of the principal, he was competent on the score of necessity;⁸ but although an agent who actually executed the business of the principal was, in all cases, competent to prove that he acted according to the directions of his principal, on the ground of necessity, and because the principal could never maintain an action against his agent for acting according to his own directions, whatever might be the result of the cause,⁹ yet if the cause depended upon the question whether the agent had been guilty of some tortious act, or some negligence in the course of executing the orders of the principal, and in respect of which he would be liable over to the principal if he failed in the action, the agent was not competent without a release.¹¹

A witness was also incompetent where the record would, if his party succeeded, be evidence of some matter of fact to entitle him to a legal advantage, or repel a legal liability.^k

⁸ *Adams v. Davis*, 3 Esp. C. 48; *Matthews v. Haydon*, 2 Esp. C. 509; and, per Lord Kenyon (*ibid.*), it is the constant course at Nisi Prius, *ex necessitate rei*, to admit the evidence of clerks and porters who were alone privy to the receipt of money or the delivery of goods; *Spencer v. Goulding*, Peake's C. 129; *Barker v. Macrae*, 3 Camp. 144; B. N. P. 289; and see *Ilderton v. Atkinson*, 7 T. R. 480; *Evans v. Williams*, 7 T. R. 481, n.; *Theobald v. Treggott*, 11 Mod. 261, cor. Holt, C. J.

⁹ *Morish v. Foote*, 8 Taunt. 454; E. C. L. R. 4. See the observations of Mansfield, C. J., in *De Symonds v. De la Cour*, 2 N. R. 374.

¹ *Rothero v. Elton*, Peake's C. 84; *Miller v. Falconer*, 1 Camp. 251.

^k *Bent v. Baker*, 3 T. R. 27; *Smith v. Prager*, 7 T. R. 60; *Abrahams v. Bunn*, 4 Burr. 2251. A copyholder was incompetent to prove a customary right in the manor for copyholders to take timber for repairs without assignment of the lord; *Lady de Fleming v. Simpson*, 2 M. & R. 164; E. C. L. R. 17.

¹ Nothing is better settled, than that the cases of agents, carriers, factors and other servants of this description constitute a class of special exceptions to the general rule that a witness interested in the subject of the suit is not competent to testify on the side of his interest. And this principle is extended to every species of agency or intervention by which business is transacted, unless the case is overborne by some other rule; *Collins v. Lester*, 16 Geo. 410; *Perkins v. Jordan*, 35 Maine, 23; *Gayle v. Bishop*, 14 Alabama, 552; *The Governor v. Gee*, 19 Alabama, 199. See also *Scott v. Jester*, 8 English, 437.

In an action against employees founded on the imputed negligence of their agent, the testimony of the latter for defendant was excluded, on the ground of interest in defeating the action; for although in an action against him by the employers, the record would not be evidence to establish his misconduct, it would be admissible to establish the quantum of damages; *Gas Light Co. v. City Council*, 9 Rich. Law (S. C.) 342; *Middlekauff v. Smith*, 1 Maryland, 329; *McClure v.*

Of the witnesses thus inadmissible by the common law, one whole class, namely, those who were excluded by having an interest in the record as an instrument of evidence, were rendered competent by the stat. 3 & 4 Will. IV., c. 42.

*123] That statute¹, in order to render the rejection of witnesses on the ground of interest less frequent, enacted that "if any witness should be objected to as incompetent on the ground that the verdict or judgment in the action on which it should be proposed to examine him would be admissible in evidence for or against him, such witness should nevertheless be examined; but in that case a verdict or judgment in that action in favour of the party on whose behalf he should have been examined should not be admissible in evidence for him, or any one claiming under him, nor should a verdict or judgment against the party on whose behalf he should have been examined be admissible in evidence against him, or any one claiming under him."

This enactment appears to have been founded upon the principle of rendering a witness competent, by removing the interest which would otherwise have disqualified him. The legislature seems not to have contemplated the admitting of the testimony of a witness in violation of the original principle of exclusion from interest, but, preserving that principle inviolate, to have intended to enlarge the limits of available evidence by the actual removal of interest, which previously impeded its reception. This was proposed to be done by silencing the record in certain cases, and so removing any interest under which the witness might otherwise labour either to procure a verdict and judgment, which would be evidence for him, or to preclude a verdict and judgment, which would be evidence against him. Consistently with this principle, the competency of a witness would not appear to have been meant to be restored in any case where, although the record were silenced, he would still have an interest, independently of the use of the record as evidence, in some other proceeding resulting as a consequence from the verdict and judgment.

*124] With reference to the decisions on this statute. It seems to have been considered from the first that the statute always rendered a witness competent in the last class of cases men-

¹ Sect. 26.

tioned above, in which the sole objection was that the record would be evidence as to a matter of fact, *e.g.* a custom^m, in which the witness had an interest, And, according to the latter construction given to it, the operation of the statute seems to have embraced all cases where the verdict and judgment could be used by or against him, either as evidence, or to establish any right, or to discharge him from any liability, and where it would be necessary to use the record for that purpose." These decisions proceeded upon the ground that the effect of calling the witness being effectually to silence the record, since neither the existence of the action nor the result could be proved but by the record, the witness's interest would be as much extinguished as if no such proceeding had taken place.

Still this Act only removed the objection where the witness was incompetent on the ground, that "the verdict or judgment in the action on which it was proposed to examine him, would have been admissible in evidence for or against him." It did not extend beyond this, and the witness was still incompetent if he laboured under any interest independently of the record, or he could avail himself of the verdict indirectly, without the production of the record. Thus it was held that the statute did not apply where the issue was directed by a court of equity, for in such a case the witness, notwithstanding the statute, *would be able to take [*125 advantage of a decree founded on the verdict.^o

The next important step upon the subject of evidence was taken at the instance of Lord *Denman*. The stat. 6 & 7 Vict. c. 85, after reciting "that the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law; and it is desirable that full information of the facts in issue, both in criminal and civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of

^m A copyholder was held competent to prove a custom of the manor on behalf of another copyholder; *Hoyle v. Coupe*, 9 M. & W. 450; *Stuart v. Barnes*, 1 M. & Rob. 472.

ⁿ *Yeomans v. Legh*, 2 M. & W. 419; *Faith v. M'Intyre*, 7 C. & P. 44; E. C. L. R. 32; *Knight v. Woore*, 7 Car. & P. 259; E. C. L. R. 32. But in an action by a corporation to establish a right of common for the benefit of the corporation, a corporator was not rendered competent by 3 & 4 Will. IV. c. 42; *Godmanchester (Bailiffs of) v. Phillips*, 4 Ad. & E. 550; E. C. L. R. 31.

^o *Stuart v. Barnes*, 1 M. & Rob. 472; and see *Oliver v. Latham*, 1 Turn. & Ph. 163; *Barber v. Birch*, 6 M. & G. 307; E. C. L. R. 46.

their testimony ;" proceeded to enact, " that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence ; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence : Provided that this Act shall not render competent any party to any suit, action, or proceeding individually named in the record ; or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment ; or the landlord or other person in whose right any defendant in replevin may make cognizance ; or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part ; or the husband or wife of such persons respectively." It also enacted, " that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on behalf of the plaintiff, or of any co-defendant in any such

*126] cause, saving just exceptions ; *and that any interest which such defendant so to be examined may have in the matter or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as effecting, or tending to affect the credit of such defendant as a witness."

This statute likewise contains a provision, which is repeated in the subsequent Act we shall have presently to consider, viz., that it should not repeal the Act 7 Will. IV., and 1 Vict. c. 26, for the amendment of the Law relating to Wills.

Up to the period of this enactment it has been remarked that the principle of the exclusion of interested witnesses in the superior courts had been rigidly adhered to. The immediately preceding statute, in rendering the witness competent by reason of the extinction of his interest involved the introduction of no new principle, inasmuch as it merely adopted an expedient frequently resorted to by the parties through the medium of a release given to, or by the witness. But this enactment had a far wider scope, for it positively abrogated the general rule that an interested person should not be a witness. Yet it must be observed that even then the legislature by no means wholly disregarded the principle of the

exclusion of a witness on the ground of interest. The various exceptions to the general provision still recognized its expediency; but their effect was to confine its operation to the five categories mentioned in the proviso. With respect to these it is important to notice that the statute did not render the persons included within them incompetent, but merely excepted them out of its operation; consequently they remained unaffected by the statute, and in the same condition as to admissibility as they were before it passed. Hence it becomes important, with a view more especially to the first and last exception, to ascertain under what circumstances those persons were previously incompetent as witnesses, and we *will proceed to consider what persons fell within the words of these exceptions, and in what cases they were previously [*127 incompetent, in the following order.

1st. "A party to any suit, action, or proceeding individually named in the record," was always, except in the peculiar case of necessity,^p an incompetent witness in his own behalf, on the ground of interest.^q¹ But parties named upon the record were

^p See *ante*, p. 27.

^q Though he were only a trustee, he was incompetent, because he would be responsible for the costs; *Bauerman v. Radenius*, 7 T. R. 663. So in equity one plaintiff could not be examined for another plaintiff without the defendant's consent; *Fyler v. Neucomb*, 19 L. J., C. C. 278. And one defendant could not be examined for another defendant in the same interest; *Wood v. Rowcliffe*, 6 Hare, 183; but see *Monday v. Guyer*, 1 De Gex and Smale, 182.

It should perhaps be stated here that there were some statutory provisions enabling parties to give evidence in their own behalf, besides the recent County Courts Act, 9 & 10 Vict. c. 95, s. 83, which directs that the parties or their wives may be examined in those Courts. Thus under the Companies Clauses Consolidation Acts, and the Lands and Railways Clauses Consolidation Acts, 8 & 9 Vict. c. 16, s. 132; 8 & 9 Vict. c. 18, s. 32; 8 & 9 Vict. c. 20, s. 133, parties might be examined by the arbitrators, or by arbitrators appointed to settle disputes between masters and workmen, 5 Geo. IV. c. 96, ss. 5, 6. Trustees and other members of loan societies, under 3 & 4 Vict. c. 110. Officers of the army, navy, and marines, and of the customs and excise, under 3 & 4 Will. IV. c. 53, in suits which entitle them to the penalties sued for or goods seized. As to inhabitants, or persons rated or rateable, or holding office in any parish, &c., in matters relating to rates, boundaries, removals, &c., see 53 Geo. III. c. 70, s. 9; and 3 & 4 Vict. c. 26; and *infra*, note (e).

¹ There are some cases in which a plaintiff is *ex necessitate* a good witness as
1. To prove notices in the course of the cause; *Fred v. Eves*, 4 Harrington, 385; *Siltzell v. Michael*, 3 Watts & Serg. 329; *Jordan v. Cooper*, 3 Serg. & Rawle, 564. 2. To prove his own book of original entries; *Prince v. Smith*, 4 Mass. 455; *Poultney, et al. v. Ross*, 1 Dall. 239. 3. To prove the loss of documents to

not as such, and on that account, incompetent; their incompetency arose exclusively from their interest, and if they were willing to give evidence they might be called by the opposite parties. Thus, in an action on a joint bond against the principal and two sureties, where one surety and the principal had suffered judgment by default, and the other surety defended, the principal was held to be a competent witness *for the plaintiff; and so was a co-defendant in an action for a malicious prosecution, who had suffered judgment by default.¹ There had been a similar decision in the case of a co-contractor who, having suffered judgment by default, was held to be an admissible witness for the plaintiff, if he were not interested in procuring a verdict for him.* And a defendant in an indictment, who had pleaded guilty, has been held by the judges to be an admissible witness for the Crown on the trial of other parties included in it.⁴

^{*} *Worrall v. Jones and another*, 7 Bing. 325; E. C. L. R. 20; overruling *Chapman v. Graves*, 2 Camp. 333, n.; and see *per* Maule, J., 5 C. B. 685; E. C. L. R. 57.

^{*} *Haddrick v. Heslop*, 12 Q. B. 267; E. C. L. R. 64; B. N. P. 285; 1 Sid. 441.

¹ *Pipe v. Steele and another*, 2 Q. B. 733; E. C. L. R. 42; *Dresser v. Clarke*, 1 C. & K. 569; E. C. L. R. 47; overruling *Brown v. Brown*, 4 Taunt. 752; *Green v. Sutton*, 2 M. & Rob. 269; *Mant v. Mainwaring*, 8 Taunt. 139; E. C. L. R. 4.

⁴ *Reg v. Hinks*, 2 Car. & K. 462; E. C. L. R. 61; *Reg v. George*, Car. & M. 111; E. C. L. R. 41. Where an accomplice is to be called as a witness, the usual course is to leave him out of the indictment; see tit. ACCOMPLICE; or if he has been inadvertently included in the indictment, should be deemed necessary, an acquittal might be taken as to him, or the Attorney-General might enter a *nolle prosequi*; *Ward v. Man*, 2 Atk. 229, by Lord Hardwicke, who said, that in Crown prosecutions, no defendant can be examined on behalf even of the King, but the Attorney-General enters a *nolle prosequi* against that particular defendant before he can be admitted as a witness; and that this was done in a case by Trevor, when Attorney-General. See also the case of *The King v. Ellis, Blake*

let in secondary evidence; *Fitch v. Bogue*, 19 Conn. 285; *Chamberlain v. Gorham*, 20 Johns. 144. 4. In an action against a carrier or innkeeper for the loss of his baggage, to prove the contents of his trunk; *Taylor v. Monnat*, 4 Duer, 116; *Wright v. Caldwell*, 3 Michigan, 51; *Lampley v. Scott*, 24 Mississippi, 528; *Sparr v. Wellman*, 11 Missouri, 230; *County v. Leidy*, 10 Barr, 45.

¹ *Manchester Bank v. Moore*, 19 N. Hamp. 564; *Parsons v. Phipps*, 4 Texas, 341. One of two defendants, consenting to be sworn, though objected to by the other defendant is a competent witness for the plaintiff; *Carrie v. Calder*, 6 Rich. 198; *Kincaid v. Purrell*, 1 Carter, 324; *Thompson v. Blanchard*, 4 Comstock, 303; *Miner v. Downer*, 20 Vermont, 461.

*A party likewise who had ceased to be interested in the result might be called by his co-plaintiff, or co-defendant.¹ [*129 Thus, in an action against two partners as acceptors of a bill of exchange, one of the defendants who had pleaded his bankruptcy and certificate, whereupon the plaintiff had entered a *nolle prosequi* against him, was held,* after releasing his surplus, to be an admissible witness for his co-defendant. So where several were indicted together, one defendant, as to whom a *nolle prosequi* had been entered, might be called as a witness for the other defendants; and so might one who had pleaded guilty, or one who was not arraigned;⁷ unless indeed in cases, such as *conspiracy or riot, where disproving joint guilt might defeat the prosecution even against the witness himself. [*130

and others, Sitt. after Trin. 1802, Macnally, 55; where on an information by the Attorney-General (Law) against several for a conspiracy, he entered a *nolle prosequi* against two, who were examined as witnesses against the others. And in B. N. P. 285, it is said, that the court would not allow the Attorney-General, on the trial of an information for a misdemeanor, to examine a defendant for the King, without entering a *nolle prosequi* as to him. But *quære*, whether in that case the witness had not been put upon his trial at the same time? and see note (l), *post*. But yet although he be jointly indicted for an offence which is several in its nature, it may be doubted whether he be not still competent, provided he be not put upon his trial at the same time; for though several be indicted jointly for the same offence, yet the indictment, where the nature of the offence is several, is also several as to each, and the case seems to be just the same as if each had been severally indicted, when they would have been witnesses for each other (2 Hale, 280, 2 Roll. Abr. 685, pl. 3); they must therefore, as it seems, be also equally competent as witnesses against each other.

* *Aftalo v. Fourdrinier*, 6 Bing. 306; E. C. L. R. 19; *Moody v. King*, 2 B. & C. 558; E. C. L. R. 9.

⁷ See tit. ACCOMPLICE. In *R. v. Lafone*, 5 Esp. C. 154, on an indictment for obstructing excise officers, Lord Ellenborough would not permit co-defendants, who had suffered judgment by default, to be examined as witnesses for the defendant

¹ There are conflicting decisions in the United States as to whether a party, plaintiff by assigning his claim and making an absolute payment into court of a sum of money sufficient to meet all the costs of the suit, can be a competent witness to establish the claim, having thus divested himself of all interest; *Central R. R. Co. v. Hines*, 19 Geo. 203; *Foley v. Mason*, 6 Maryland, 37; *Owings v. Emery*, 7 Gill. 405; *Patterson v. Cobb*, 4 Florida, 481; *Bridges v. Armour*, 5 Howard, S. C. 91; *Evans v. Gibbs*, 6 Humph. 405; *Benjamin v. Coventry*, 19 Wend. 353; *Willig v. Consequa*, Peters C. C. Rep. 248; *Steele v. Phoenix Ins. Co.*, 3 Binn. 306; *Hart v. Heilner*, 3 Rawle, 407; *Post v. Avery*, 5 Watts & Serg 510; *Wolf v. Fink*, 1 Barr, 173; *Park v. Bird*, 3 Barr, 361; *Norris v. Johnston* 5 Barr, 290.

But where a party on the record was interested on the side of the person who called him, he was not admissible. Thus in an action of *assumpsit* one defendant, who had suffered judgment by default, was not an admissible witness for another defendant in the action who had pleaded the general issue, for if he disproved the joint contract he would relieve himself;* and so a defendant in trover or trespass, who had suffered judgment by default, was not an admissible witness for a co-defendant who had pleaded, where the jury were summoned to assess the damages as well as to try

who was tried, saying, that he had never known such evidence admitted on an indictment for a joint offence. The cases on the subject were not, it seems, adverted to on that occasion. In *R. v. Fletcher*, Str. 633, one who had suffered judgment by default on a joint indictment for an assault, and having been fined a shilling and had paid it, was admitted as a witness for the other defendant. There indeed the witness had been fined; but it is difficult to say how the circumstance, that the judgment has been pronounced and executed on the witness, can make any difference as to his competency, or how his giving evidence can at all alter or affect his legal situation. It has been held, that upon several indictments against three for perjury in proving a bond, each was a witness for the others; *R. v. Bilmore, Gray and Harbin*, 2 Hale, 280; and see also *Gunston v. Downs*, Ibid. and 2 Rol. Abr. 685, pl. 3. According to the same principle, if each had been separately indicted for a battery or larceny, the others would have been competent witnesses; for the same reason applies which is given by Lord Hale, *viz.*, that they are not immediately concerned in the trial against the third, and therefore they would, it should seem, be also competent, although they were all to be included in one indictment, which in legal effect operates as a several indictment as to each; see *R. v. Frederick and Tracy*, Str. 1095, where upon an indictment against several for an assault, the reason for refusing to admit the wife of one as a witness for another defendant, was, that it was impossible to separate the case of the two defendants; *R. v. Sherman*, C. T. H. 303. It has indeed been suggested, that if one who suffered judgment by default were a competent witness, one defendant, by so doing, might protect the rest (5 Esp. C. 155); assuming it to be probable that one of several delinquents would sacrifice himself for the salvation of the rest, it would by no means be a necessary consequence that he would be able to screen them; his credit would be open to the observation of the jury, and be subject to much suspicion. Where, however, the offence is of such a nature, that an acquittal of his associates would enure to his own discharge a co-defendant would be incompetent. Thus an accessory before or after the fact would be incompetent as a witness for the principal; and see tit. CONSPIRACY. Where several are indicted and tried together, if at the close of the prosecutor's case there appears to be no evidence against one defendant, the Judge will direct his acquittal, in order that he may be called as a witness by another defendant; *R. v. Fraser*, Macnally, 56; *R. v. Owen*, 9 Car. & P. 83; E. C. L. R. 38.

* *Brown v. Fox*, 1 Phil. on Evid. 9th ed. 49; *Bell v. Banks*, 3 M. & G. 261; E. C. L. R. 42.

the issue joined by the one who defended, for he had an interest reducing the damages.¹

*Under this statute, therefore, a party to the record might still be examined as a witness wherever he was indifferent [*131 or was called upon to be such adversely to his own interest. It is true that there might be no compulsion^b upon him to attend, there being no instance in which the court ever punished a party to the suit for non-attendance or a refusal to give evidence as a witness, or an action had been brought against him on that account, and hence resort was generally had in such cases to a bill of discovery; but if he did attend, and was willing to give evidence, there was no rule which enabled the court to reject his testimony.

Previously to the passing of this statute in an action by or against a corporation or other body, the members of which were not mentioned by name on the record, a member having any private^c interest in the result was not competent as a witness on behalf of the body on account of that interest.^d The interest, however, of such a person was obviously very different^e from that

¹ *Mash v. Smith*, 1 Car. & P. 577; E. C. L. R. 12; *per* Burroughs, J., *Webber v. Budd*, Rosc. on Evid. 121, 7th ed.; and so even after the statute 6 & 7 Vict. c. 85; *Thorpe v. Barber and another*, 5 C. B. 675; E. C. L. R. 57.

^b *Rex v. Woburn*, 10 East, 395; *Fenn v. Granger*, 3 Camp. 77; *Rex v. Adderbury*, 5 Q. B. 187; E. C. L. R. 48.

^c If he had no private interest, but simply an interest as one of the public, he was competent; *Fletcher v. Greenwell*, 1 C. M. & R. 754; *M'Gahey v. Alston*, 2 M. & W. 206; and see *Weller v. The Governors of the Foundling Hospital*, Peake, 153.

^d B. N. P. 290; *Davis v. Morgan*, 1 Tyr. 457; *Burton v. Hinde*, 5 T. R. 174; *Bailiffs of Godmanchester v. Phillips*, 4 Ad. & E. 550; E. C. L. R. 31.

^e There were various statutes which enabled inhabitants and other persons to be witnesses where the proceedings were by or against them in their *quasi* corporate capacity; 1 Anne, c. 18, s. 13; 8 Geo. II. c. 16, s. 15; 27 Geo. III. c. 29; 7 & 8 Geo. IV. c. 29; and 3 & 4 Will. & M. c. 11; 54 Geo. III. c. 170, s. 9; 3 & 4 Vict. c. 26, ss. 1 and 2.

¹ *Thornton v. Blaisdell*, 37 Maine, 190; *King v. Lowry*, 20 Barber, 532; *Rice v. Morton*, 19 Missouri, 263; *Chase v. Lovering*, 7 Foster, 295. See *Barker v. Ayers*, 5 Maryland, 202.

In an action not on contract commenced against two and process served on one only, the one not served ceases to be a party, and is a competent witness for either party; *Robinson v. Frost*, 14 Barbour, 536. Ordinarily a joint-tort-feasor is a competent witness for either party, if he be not sued or be sued in a separate action, or being joined have suffered judgment to be rendered against himself; *Paine v. Tilden*, 20 Vermont, 554. When judgment is recovered against two jointly, and it is opened as to one only, who is let into a defence, the other is a

of an ordinary party, and^f it would seem that the legislature introduced the words, "any party *individually* named," in contradistinction^g to persons described by **some nomen collectivum* *132] upon the record, so that a person who is not named "*as an individual*" might not fall within the exception; consequently it would appear that a member of a corporation aggregate, or other like body, so far as this exception was concerned, was rendered a competent witness by the general provision.

The *prochein ami*, or guardian of an infant, was formerly incompetent on the ground of his interest in the cause to save himself from the payment of costs, for which, in case of failure, he was personally responsible; but in construing the words of this exception the Court held, that the person to fall within its terms must be a person who is named as a *party* to the proceeding, and therefore that a *prochein ami*, who is in reality only an attorney for the conduct of the suit, might be called as a witness for the infant.^h

2ndly. "Any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment," might always have been examined; the former, if he were willing to give evidence,ⁱ by the defendant; the latter, by the plaintiff:^k but, inasmuch as the former of these persons had an immediate and direct interest in preventing a verdict for the defendant, both on account of the result which would confer on him the right of possession of the property, and of the liability to costs which would ensue from such a verdict, he was not an admissible witness for the plaintiff, although there might be demises by other persons in the declaration.^l So the tenant of the premises was interested in defeating a verdict for the plaintiff, which would turn him out of possession;^m

^f See *R. v Mayor, &c., of London*, 2 Lev. 231; 1 Vent. 351.

^g *Per Parke, B., Sinclair v. Sinclair*, 13 M. & W. 645.

^h *Sinclair v. Sinclair*, 13 M. & W. 640; *Melhuish v. Collyer*, 19 L. J., N. S., Q. B. 493.

ⁱ *Ferne dem. Pewtress v. Granger*, 3 Camp. 177.

^k *Doe v. Green*, 4 Esp. 198.

^l But if he consented that a verdict should be entered against him, on his demise, he might be examined for the other lessors, *per cur.* 2 Ad. & E. 339; E. C. L. R. 29.

^m *Doe dem. Foster v. Williams*, Cowp. 621; *Doe v. Wilde*, 5 Taunt. 183; E. C. L. R. 1; *Doe v. Bingham*, 4 B. & Ald. 672; E. C. L. R. 6; *Doe dem. Willis v. Birchmore*, 9 Ad. & E. 662; E. C. L. R. 36.

competent witness for him, his own liability being determined; *Talmage v. Burlingame*, 9 Barr, 21.

ⁿ *Pryor v. Ryburn*, 16 Arkansas, 671; *Murphy v. Murphy*, 24 Missouri, 526.

but, as he was not a party to the suit, he might have been subpoenaed on the *part of the plaintiff, and forced by him to [*133 give his testimony. The effect of the statute was not to exclude these persons from being witnesses at all, but simply to leave them incompetent on that side which they were interested in supporting.

3rdly. "The landlord, or other person in whose right any defendant in replevin made cognizance," was always an admissible witness for the plaintiff; but he was not an admissible witness for the defendant,^a and yet where distinct cognizances were made under different parties, not appearing to be connected in interest, and the issue on one cognizance was abandoned by the defendant at the trial, the person under whom that cognizance was made, if he did not employ the attorney, was a competent witness for the defence.^o But, since the passing of this statute, in a case where the defendants made cognizance, first as bailiffs to J. and F. M'Gowan, and secondly, as bailiffs to J. M'Gowan alone, and no evidence was offered in support of the first cognizance, and it was proposed to abandon it and call F. M'Gowan in support of the second to prove a fact alleged therein, and not in issue upon the first, it was held under this clause by Alderson, B., (after consulting Lord Denman, C. J.,) that the evidence of F. M'Gowan was not admissible.^p And where the taking was justified in several cognizances under different persons, and one of them was admitted by Wilde, C. J.,^q to prove matters distinct from and independent of the subject-matter of the cognizance made under him; the Court of Common Pleas afterwards expressed a clear opinion that his evidence was inadmissible, while the cognizance made under him remained *upon the record as part of the effective title [*134 claimed on the part of the defendants.^r

4thly. "Any person in whose immediate and individual behalf any action may be brought or defended either wholly or in part." This was the great exception in this enactment, and from the generality of its terms and the consequent wideness of its operation it led to much discussion. The only ground on which

^a *Golding v. Nias*, 5 Esp. 272; *Upton v. Curtis*, 1 Bing. 210; E. C. L. R. 8.

^o *King v. Baker*, 2 Ad. & E. 333; E. C. L. R. 29.

^p *Girdlestone v. M'Gowran*, 1 Car. & K. 702; E. C. L. R. 47. But in this case *King v. Baker*, 2 Ad. & E. 333, E. C. L. R. 29, was not referred to.

^q *Walker v. Giles*, 2 Car. & K. 671; E. C. L. R. 61.

^r *Walker v. Giles et al.*, 6 C. B. 662; E. C. L. R. 60.

persons in the predicament pointed out in this exception were inadmissible as witnesses before Lord *Denman's* Act was, that they were interested on the side on which their testimony was proposed to be given,^a and under the operation of this statute, that circumstance was still the only ground of exclusion. If, therefore, they were called adversely to their own interest, or their interest when they were called to support it was removed by means of a release, or the objection could be met by the provisions of the statute 3 & 4 Will. IV. c. 42, they became admissible.

In treating upon this branch of the enactment it will perhaps be better to consider the effect of the word "immediate," as distinct from "individual" in the first place, remembering at the same time that both of these terms must have been satisfied in order to exclude the witness, and if the proceeding were not brought or defended on his immediate, as well as his individual behalf the witness was competent. Now although there was no presumption in favour of incapacity, yet an action will be presumed to be brought on behalf of the party who appears to be principally interested.^b Thus an action by a broker, upon a contract made by him for his principal, to recover the sum due under that contract, though it include the broker's commission, is evidently an action brought on the immediate* behalf of the
 *135] principal; and since the passing of the statute, where the party in whose name the action was brought, and the witness bore the relation of trustee and *cestui que trust* to each other in respect of the matter sought to be recovered in the action, the latter was deemed to be a person in whose immediate behalf the action was brought, and inadmissible as a witness.^c So, a creditor of a bankrupt was held (by Wild, C. J.) inadmissible as a witness for the assignees, in an action by them to recover money paid as a fraudulent preference,^d though a contrary opinion was expressed upon this question by Pollock, C. B.^e And where the action was brought upon a promissory note made to the plaintiff, a member of a joint-stock company, for the benefit of the company, another

^a As to persons who were inadmissible on this ground before, see *ante*, p. 118.

^b *Bell v. Smith*, 5 B. & C. 188; E. C. L. R. 11.

^c *Wade v. Simeon*, 2 C. B. 342; E. C. L. R. 52.

^d *Belcher v. Brake*, 2 Car. & K. 658; E. C. L. R. 61.

^e *Johnson v. Graham*, 2 Car. & K. 808; E. C. L. R. 61; and see *Hart v. Stephens*, 6 Q. B. 937; E. C. L. R. 51.

member of the company was considered by Parke and Alderson, BB., to be incompetent for the plaintiff.^a

In *Hill v. Kitching*,^a which was an action by a ship-broker against a ship-owner, for his commission in procuring a charter for the latter, Cramond, a witness, stated that the defendant applied to him to procure freight for his vessel, whereupon he introduced him to the plaintiff; that the negotiation took place at his office, but he had nothing to with it, and had no claim against the defendant; but pursuant to agreement with the plaintiff and to the custom, he should receive half the commission from the plaintiff, if he recovered. He was held to be a competent witness, not being within the excepted class. "If it had appeared," said Tindal, C. J., "that the plaintiff had made over to Cramond a moiety of the commission, then I should have said that Cramond was a person in whose immediate and individual behalf the action was in *part brought. But that is not so. Cramond, though he claims a moiety of the commission under a separ- [*136
ate and distinct agreement with the plaintiff, has no right to lay his hand upon any portion of the money to be recovered in this action, and there was no evidence to show that he was any party to the bringing of the action."

The rule deducible from these cases and observations would appear to have been, that a witness who was so interested in the thing sued for, whether goods or money, that, when recovered by the party for whom he appeared, it would be his property, or if recovered from the party for whom he appeared, he (the witness) would be the loser of it either wholly or in part; or a witness who had set the suit in motion, or actually defended it by employing the attorney, being liable to him for the costs,^b was a person in whose immediate and individual behalf the action was brought or defended within this exception.

On the construction of this exception it was also decided, that creditors of a bankrupt were admissible witnesses for the defendant in an action brought by the bankrupt against his assignee, to try the validity of the fiat; and it was considered immaterial whether they had, or had not proved their debts.^c And in an action by

^a *Clark v. Bell*, 12 Jur. 421.

^a 3 C. B. 299; E. C. L. R. 54.

^b *Walter v. Thompson, cor. Patterson, J.*, Oxford Sum. Assizes, 1845; see note to *Bent v. Baker*, 2 Smith L. C. 3rd ed. 54.

^c *Columbine v. Penhall*, 19 L. J., N. S., Q. B. 302. And so a petitioning

the assignees, the bankrupt himself was competent to prove the petitioning creditor's debt,^d or the act of bankruptcy, or any other matter to support the fiat.^e For the same reason, a legatee of money charged on land was admissible as a witness, to support the will giving that land to the defendant, in an ejectment brought for the same land under another will devising it otherwise.^f So *137] the possibility of benefit did not exclude a husband from giving evidence for the administrator of his wife, in an action brought by him on a promissory note given to the wife while sole, the husband having no interest in the amount recovered till his wife's debts, contracted while unmarried, were paid.^g In an action likewise of trover^h for two promissory notes, in which the question was, whether they were the property of the plaintiff or of one Mytton, and the defendant asserted that they were the property of Mytton, and were improperly in the possession of the plaintiff, whereupon the defendant as Mytton's agent took them from him; Mytton being called as a witness for the defendant stated on the *voir dire* that he had not indemnified the defendant, and had nothing to do with the action. It was thereupon objected that he was incompetent, but his evidence was held by the court to have been rightly admitted.

A mere liability also to answer over against the consequences of an action, as for instance that of a sheriff's officer, for whose misconduct in not arresting when he had an opportunity an action was brought against the sheriff, did not render such a witness a person in whose immediate or individual behalf the action was defended;ⁱ nor did an engagement to pay half the costs of defending the action, the witness not being the defendant's partner, nor having retained the attorney.^k

But, in order to exclude the witness, the action must have been

creditor was held a good witness to support the fiat; *Johnson v. Graham*, 2 C. & K. 808; E. C. L. R. 61.

^d *Groom v. Watson*, 19 L. J., N. S., C. P. 364.

^e *Udall v. Walton*, 14 M. & W. 254.

^f *Doe dem Bengo v. Nicholls*, 18 L. J., N. S., Q. B. 81.

^g *Hart v. Stephens*, 6 Q. B. 937; E. C. L. R. 51.

^h *Hearne v. Turner*, 2 C. B. 535; E. C. L. R. 52.

ⁱ *Wilson v. Magnay*, 1 Car. & K. 291; E. C. L. R. 47; *Wheeler v. Senior*, 1 Car. & K. 293; E. C. L. R. 47, *per* Wightman, J. Before the recent statute he would certainly have been inadmissible; *Groom v. Bradley*, 8 C. & P. 500; E. C. L. R. 34, *per* Parke, B.

^k *Sage v. Robinson*, 3 Ex. 142.

brought or defended not only in his immediate, but also in his individual, behalf, either wholly or in part. Looking to the construction put upon this word in the former clause,¹ it would appear to have a similar operation* in this; and that where an action was brought for or against a corporation in its aggregate name, though the members might be entitled to the benefit of the thing sought to be recovered in their corporate or collective capacity, or might be so subjected to the loss which an adverse verdict might entail, yet the members were competent as witnesses. The reason for this is obvious when we reflect on the slight interest which individuals so situated had in the result.

5thly. "The husband or wife of such persons respectively." This is the last exception, and refers to the whole of the other exceptions.

The law has ever regarded the interest of husband and wife as so identical, that where the one was incapacitated^m on the score of interest, the other could not give evidence. Thus, in an action against the sheriff to recover the value of goods which had been sold by him under an execution against the husband, brought by the trustee of a marriage settlement for the sole and separate use of the wife, the husband was held to be incompetent as a witness for the plaintiff to show that the goods had been conveyed to the plaintiff upon that trust.ⁿ So, where a woman against whom an action of debt was brought pleaded coverture, her husband was held to be an incompetent witness to support the plea.^o And, in an action of trespass against two persons for seizing the plaintiff's goods, the wife of one of the defendants was held to be incompetent as a witness for the other to prove that he never authorized the seizure, and this, too, although the case as against her husband was clearly proved. Being sworn to speak the whole truth, she *could not be prevented from stating facts which might tend to acquit her husband, or to relieve him.^p In a criminal [*139 case, also, a wife could not be examined for another defendant upon a charge against him and her husband, for example, of conspiracy,

¹ See *per Parke, B., Sinclair v. Sinclair*, 13 M. & W. 640; and see *ante*, p. 131, and the cases there cited.

^m B. N. P. 286. The rule that the husband and wife shall not bear evidence against each other, which depends upon different considerations, together with the exception to it, has been already adverted to.

ⁿ *Davis v. Dinwoody*, 4 T. R. 678.

^o *Woodgate v. Potts*, 2 C. & K. 457; E. C. L. R. 61.

^p *Hawkesworth v. Showler*, 12 M. & W. 45.

where the acquittal of the one might enure to the discharge of the other defendant.¹ And it has even been held, before the more recent act, that the wife of one prisoner could not be called as a witness to prove an *alibi* for another prisoner on an indictment against both for burglary, inasmuch as her evidence, by impugning the evidence of a witness who identified both prisoners, would materially impair the weight of his evidence generally with the jury; but there seems to be a stronger reason than this, viz., that she would be sworn to speak the *whole* truth, and could not therefore be prevented from testifying in her husband's behalf. The effect of this enactment was to render a husband or wife competent, though interested in the result, in all cases where the interest of the husband or wife was not of the class mentioned in the prior exceptions.¹

¹ *R. v. Locker*, 5 Esp. 107.

² *Rex v. Smith*, 1 Mood. C. C. 289; but see *R. v. Sills*, 1 C. & K. 494, *contra*; E. C. L. R. 47.

¹ The rule before the statute was not confined to the cases when the husband or wife is a party, but wherever either would be incompetent as an interested witness the other is so likewise; *Griffin v. Brown*, 2 Pick. 304; *Leggett v. Boyd*, 3 Wend. 376; *Hall v. Dargan*, 4 Alabama, 696; *Seigling v. Main*, 1 McMullan, 252; *Abbott v. Clarke*, 19 Vermont, 444; *Edwards v. Pitts*, 3 Strobb. 140; *Bisbing v. Graham*, 14 Penna. State Rep. 14; *Pipher v. Lodge*, 16 Serg. & Rawle, 214.

But see *Dyer v. Homer*, 22 Pick. 253, where it was decided that although the effect of a husband's testimony may be to increase a fund given to trustees for the benefit of his wife and the income of which is to be paid over to her for her sole use, and upon her own receipts under her hand, he is not therefore an incompetent witness, his interest being contingent. *Contra*, that the husband cannot be a witness either for or against his wife, in a suit concerning her separate estate; *Warne v. Dyott*, 2 Edw. Ch. Rep. 497; *Hosack v. Rogers*, 8 Paige Ch. Rep. 229; *Burrell v. Bull*, 3 Sandford Ch. Rep. 15; *Hodges v. The Bank*, 13 Alabama, 455; *Footman v. Pendergrass*, 2 Strobb. Eq. 317; *Mayrant v. Guignard*, 3 Strobb. Eq. 112; *Williamson v. Morton*, 2 Maryland Ch. Decis. 94; *Snyder v. Snyder*, 6 Binn. 483.

Although the husband might be a competent witness as called to testify against his own interest, and be compellable to do so, yet his wife will not be a competent witness, and this is peculiarly on the ground of policy to prevent that discord and dissension which would otherwise be likely to arise between the parties. Therefore if one of two or more defendants in equity suffers the bill to be taken *pro confesso*, and other defendants answer, the wife of the defaulted defendant is not a good witness for the complainant; *Sparhawk v. Buell*, 9 Vermont, 41; see *Hadley v. Chapin*, 11 Paige, 245.

A wife may be admitted as a witness against her husband in an indictment for a

This exception becomes most important for consideration with a view to the last enactment upon this subject, which we shall now proceed to discuss; and as it defines the persons falling within it by reference to the preceding exceptions, it has rendered it necessary to afford an explanation of the whole of them, which might otherwise have been partially dispensed with.

Shortly after the passing of Lord *Denman's* Act, the statute for the establishment of County Courts, which superseded a large number of minor tribunals where the objection to the admissibility of witnesses on the score of interest was not allowed to prevail, was promulgated; and by this it was provided, that in those new Courts, not only the parties, but their wives and all other persons, "should be witnesses on either side." This paved the way for the introduction by Lord *Brougham* of the last and [*140 most sweeping measure upon the subject of the inadmissibility of witnesses on the ground of interest, viz., the recent "Act to amend the Law of Evidence."^b This statute, after reciting that "whereas it is expedient to amend the law of evidence in divers particulars," enacts^a "that so much of Sect. 1 of the Act of the 6th and 7th years of Her present Majesty, chap. 85, as provides that the said

^a 9 & 10 Vict. c. 95, s. 83.

^b Sect. 1.

^c 14 & 15 Vict. c. 99.

criminal offence committed by him against her; *The State v. Davis*, 3 Brevard, 3. But only when it is an injury to her person, not when it is to wrong her in her property, as by subornation of perjury; *The People v. Carpenter*, 9 Barbour S. C. 580. So she is a competent witness for him to disprove the charge; *The State v. Neill*, 6 Alabama, 685. The husband having been examined for the State, the wife is a competent witness on the other side, to show that the husband testified under a bias against the defendant but not to contradict him; *Cornelius v. The State*, 7 English, 782. The wife who keeps her husband's books is a competent witness to prove his book of original entries; *Littlefield v. Rice*, 10 Metcalfe, 287. The principle of necessity which enables a party to prove the contents of a lost trunk applies to the wife, and renders her also a competent witness in such a case; *McGill v. Rowand*, 3 Barr, 451.

After a divorce, or death, neither will be permitted to testify against the other in respect to transactions which occurred during the coverture; *Barnes v. Camack*, 1 Barbour, 392; *Cook v. Grange*, 18 Ohio, 526; *Gaskill v. King*, 12 Iredell, 211; *Bradford v. Williams*, 2 Maryland Ch. Decis. 1; *Hay v. Hay*, 3 Richardson Eq. 384. A wife after the death of her husband is competent to prove facts coming to her knowledge from other sources than by means of her situation as wife, notwithstanding they relate to the transactions of her husband; *Wells v. Tucker*, 3 Binn. 366; *Cornell v. Vanartsdalen*, 4 Barr, 374; *Chambers v. Spencer*, 5 Watts, 404.

Act shall not render competent any party to any suit, action, or proceeding, individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, is hereby repealed.” It then proceeds^{*} to enact that “on the trial of any issue joined or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice; or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence, the parties thereto, and the persons on whose behalf any such suit, action or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition according to the practice of the court, on behalf of either or any of the parties to the said suit, action or other proceeding.” By way of exception, however, to these general provisions, it is declared that “nothing herein contained shall render any person who[†] in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary *conviction, competent or compellable to give evidence for *141] or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.” And also[‡] that “nothing herein contained shall apply to any action, suit, proceeding, or bill, in any Court of Common Law, or in any Ecclesiastical Court, or in either House of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage.”

By the first section therefore of this enactment it will be found, on reference to Lord *Denman's* Act, that the whole of the exceptions contained in it, save the last which related to the husbands and wives of the parties mentioned in all the exceptions, was repealed, and the general enabling clause which that Act contained would have prevailed. It therefore became requisite to limit its operation by the two last sections above quoted; and in order to

^{*} Sect. 2.[†] Sect. 3.[‡] Sect. 4.

put an end to all questions, as well to render parties compellable by their adversaries or other parties to give evidence, the second section seems to have been introduced. The exception therefore in the prior enactment as to the evidence of husbands and wives in the instances mentioned in it, and the two clauses above quoted from the last statute, are the only remnants of the ancient rule upon this subject; and all other persons are now admissible as witnesses without reference to any interest they may possess. With regard to those two clauses, the reasons for excluding the persons falling within them are so obvious, and their language is so explicit, as to render further explanation superfluous; but, with regard to the other exception, there has already been considerable discussion, and some difference of opinion.^a

*Whether the exclusion of the evidence of the wife at common law depended upon the identity of interest between her and her husband, or upon the interest which society has to preserve the peace and confidence of families, has been strongly disputed. Whichever be the foundation of the rule, the legislature seems to have thought that the question of the admissibility of the evidence of husbands and wives, for or against one another, involved other considerations than that of mere interest, and purposely to have omitted this exception from the repeal effected by the 1st section. It is however singular that, either from inadvertence or for some reason which it is difficult to comprehend in the subsequent section, which provides that parties and persons on whose behalf the action is brought shall be competent and compellable to give evidence, there is no qualification whatever; and the result is, that under that provision, where the husband and wife are parties to the action or suit, they may both give evidence. Thus, where goods were supplied to a wife before marriage, and the husband and wife were sued for the price, they were both allowed to give evidence for the defence.^b But if the case does not fall within that section, and both the husband and wife are not parties, it has now been decided^c that in civil proceedings the exception in Lord *Denman's* Act prevails, and the old rule of exclusion applies, and as expressed by Parke, B.,^d “The wife is not a competent wit- [*142]

^a See *Stapleton v. Croft*, 16 Jur. 408.

^b *Christian v. Horwood and Ux. cor.* Pollock, C. B., London Sittings after M. T. 1851.

^c *Stapleton v. Croft*, 16 Jur. 408, *dissentiente*, Earle, J.; *Barbat v. Allen*, 21 L. J., Ex. 154.

^d *Barbat v. Allen*, 21 L. J., Ex. 154.

ness in a civil suit to which her husband is a party. She was incompetent in such cases by the common law, and I do not stop to inquire whether that was simply on the ground of interest or of the relationship between the parties, though the latter is the reason usually assigned in the books, and it is clear that by the recent Law of Evidence Act, 14 & 15 Vict. c. 99, it was never meant that *143] the *wife should be a competent witness for or against her husband."

If however the adversary do not object, it would seem that the husband or wife might be examined, and perhaps the judge could not reject the evidence; but after the party has once objected, it is entirely in the discretion of the judge whether he will allow the objection to be withdrawn.^e

Unless the interest of the witness was apparent from the record itself or from the admission of the adversary, it lay with the party making the objection to establish it^f to the satisfaction of the judge,^g either by the examination of the witness on the *voir dire* or by independent evidence.^h

Notwithstanding the *prima facie* appearance of interest on the part of the witness on the face of the record, it was held his evidence ought not to be rejected without examining him on the *144] *voir dire* as to his real situation.ⁱ The witness might be examined generall yas to his situation,* and even as to the con-

^e *Barbat v. Allen, supra.*

^f *Doe dem. Norton v. Webster*, 12 Ad. & E. 442; E. C. L. R. 40; *Bunter v. Warre*, 1 B. & C. 689; E. C. L. R. 8.

^g The judge at *nisi prius* is the person to decide, both as to the facts and the law, on a question as to the competency of a witness; *Doe dem. Norton v. Webster*, 12 Ad. & E. 442; E. C. L. R. 40.

^h Formerly it was necessary to have the witness sworn on the *voir dire*, and to take the objection before he was sworn in chief, but the rule has been relaxed for the sake of convenience; *Turner v. Pearte*, 1 T. R. 717. The witness may be examined on the *voir dire* in criminal as well as civil cases; *R. v. Muscot*, 10 Mod. 192; see *Lord Lovat's case*, 18 How. St. Tr. 530. In *R. v. Wakefield and others*, 2 Lew. Cr. C. 279, on an indictment for a conspiracy to carry away Miss Turner and marry her to one of the defendants, on an objection taken by the defendants to the competency of Miss T., on the ground that she was married to one of the defendants, Hullock, B., held, that the proper course was first to examine Miss T. on the *voir dire*, and afterwards to adduce collateral evidence.

ⁱ *Bunter v. Warre*, 1 B. & C. 689; E. C. L. R. 8; *Goodhay v. Hendry*, Mood. & M. 319; E. C. L. R. 22; *Carlile v. Eady*, 1 C. & P. 234; E. C. L. R. 12; *Lunniss v. Row*, 10 Ad. & E. 606; E. C. L. R. 37; *Quarterman v. Cox*, 8 C. & P. 97; E. C. L. R. 34; *Hartshorne v. Watson*, 5 Bing. N. C. 477; E. C. L. R. 35.

tents of written documents which were not produced;^k for the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection; and in like manner his competency might be restored by his parol evidence on the *voire dire*.¹¹ If the witness discharged himself on the *voire dire*, the party who objected might still afterwards support his objection by evidence;^{m2}

^k *R. v. Gisburn*, 15 East. 57; *Howell v. Locke*, 2 Camp. 14; *Lunniss v. Row*, 10 Ad. & E. 606; E. C. L. R. 37.

¹ *R. v. Gisburn*, 15 East. 57; *Brockbank v. Anderson*, 7 M. & G. 295; E. C. L. R. 49; and see *Botham v. Swingler*, 1 Esp. C. 164; *Butcher's Company v. Jones*, *ib.* 160.

^m In *R. v. Muscot*, 10 Mod. 192, Parker, C. J., is reported to have stated that a party has his election to prove the interest of the witness either by examination on the *voir dire* or by evidence, but that he could not do both; and see *Lord Lovat's case*, 18 How. St. R. 530.

¹ *Stebbins v. Sackett*, 5 Conn. 258; *Miller v. Mariner's Church*, 7 Greenleaf, 51; *Hays v. Richardson*, 1 Gill. & Johns. 366; *Mayo v. Gray*, 2 Pennington, 837; *Fifield v. Smith*, 8 Shepley, 383.

² But the better opinion in the United States is that a party putting a witness on his *voir dire* is bound by his answers and cannot establish his incompetency *aliunde*: and *vice versa*, if he fails in the proof *aliunde*, he cannot resort to the examination on the *voir dire*. It is however always open to the party to adduce evidence of interest in the witness with a view to impeaching his competency with the jury; *Mifflin v. Bingham*, 1 Dall. 272; *Mallet v. Mallet*, 1 Root, 501; *McAlister v. Williams*, 1 Overton, 107, 119; *Bridge v. Wellington*, 1 Mass. 219; *Chance v. Hine*, 6 Conn. 231; *Dorr v. Osgood*, 2 Tyler, 28; *Bisbee v. Hall*, 3 Hammond, 449; *Welden v. Buck*, Anthon, 9; *Walker v. Sawyer*, 13 New Hampshire, 191; *Schnader v. Schnader*, 2 Casey, 384.

Contra, *Stebbins v. Sackett*, 5 Conn. 258.

If the witness's competency is impeached *aliunde*, it must be sustained *aliunde*. The party producing him is not entitled to put him on his *voir dire*; *Wright v. Mathews*, 2 Blackford, 187; *The Watchman*, Ware, 232; *Anderson v. Young*, 9 Harris, 443; *Haynes v. Hunsicker*, 2 Casey, 58.

When a party has attempted to exclude a witness produced against him, by evidence from others of his interest and has failed, the judge, in his discretion, may permit him to examine such witness on the *voir dire*; but it is doubtful whether this may be claimed as a right; *Butler v. Tufts*, 1 Shepley, 302. Where a mere offer has been made to prove a witness interested, he may still be examined on his *voir dire* when the testimony offered was overruled; *Main v. Newson*, Anthon, 11.

If the interest of a witness appears from his own testimony he may testify to facts which will remove the objection; *aliter*, when his interest is otherwise shown; *Montgomery Plank Road Co. v. Webb*, 27 Alabama, 618. If however the interest of the witness appears of record or on the face of the instrument sued on, he is incompetent to prove his own release; *Hiscox v. Hendree*, *Ibid.* 216. When the

but in so doing the objecting party was bound by the usual rules of evidence, and could not inquire as to the contents of a written instrument without producing it, or proving the usual preparatory steps.^a

The objection to competency ought properly to be taken in the first instance, previously to an examination in chief;^o where it is discovered incidentally in the course of the cause that the witness is inadmissible, his evidence will be struck out, although no objection has been made to him on the *voire dire*.^{p 3} Yet it seems that a party who is cognizant of the objection of the witness at the time when he is called, ought to make his objection in the first instance, according to the general principle.^q *This seems
*145] to be a matter entirely within the discretion of the court. Where the witness, having been examined, had left the box, but on being recalled answered a question put by the court, from which it appeared that he was interested, it was held that his competency could not then be disputed.^r And where a witness had been examined and cross-examined or interrogated without objection, it was held that the objection to competency could not

^a *Howell v. Locke*, 2 Camp. 14.

^o *Hartshorne v. Watson*, 5 Bing. N. C. 477; E. C. L. R. 35. The ancient doctrine on this head was so strict, that if a witness were once even sworn in chief he could not afterwards be objected to on the ground of interest; but this rule has been relaxed; see *Jacobs v. Layborn*, *infra*, note.^q

^p *Per* Lord Ellenborough, *Howell v. Locke*, 2 Camp. 14; *Perigal v. Nicholson*, 1 Wightw. 64.

^q *Turner v. Pearte*, 1 T. R. 717. But the doctrine in the text has been much shaken in *Jacobs v. Layborn*, 11 M. & W. 685, where a witness for the defendant after answering several questions upon examination in chief, was stopped by the plaintiff's counsel, and in answer to his questions acknowledged that he was answerable to the defendant's attorney for the costs. It was held by the court in banc that the objection to his competency was not too late, and Lord Abinger, C. B., there observed, that a counsel may wait and see whether the witness will speak the truth, and if he finds he does not, then he may examine him on the *voir dire*, and exclude his testimony.

^r *Beeching v. Gower*, Holt's C. 313; E. C. L. R. 3; *Wollaston v. Hakewill*, 3 M. & G. 297; E. C. L. R. 42; *Fellingham v. Sparrow*, 9 Dowl. P. C. 141; *Dewdney v. Palmer*, 4 M. & W. 664.

interest of a witness as partner of the plaintiff is shown by evidence *aliunde* after he has been examined he cannot be recalled to restore his testimony on his *voir dire*; *Robinson v. Turner*, 3 Iowa, 540.

¹ See *ante*, p. 115, note.

be taken at the trial.^a The courts will not, it seems, grant a new trial on the mere ground that it has been discovered, subsequently to the trial, that some of the witnesses were inadmissible.^b If the evidence of a witness be improperly admitted or rejected, the court will grant a new trial, unless perhaps it be perfectly clear that its admission or rejection could have had no effect on the verdict, or the court beyond all doubt, if the verdict had been the other way, would have set it aside as improper, or where it related only to particular issues; and as to them the verdict has either been found for the objector in favour of the party applying for the new trial,^c or the other party consents that it shall be so entered.

*III. *The mode of examination in chief—Cross-examination,—and re-examination of witnesses.* [*146—*166

Upon the examination of a witness in chief, the principal rule to be observed is, that *leading questions* are not to be asked; that is, questions which suggest to a witness the answer which he is to make. Where a witness is too ready to serve the cause of his party, and willing to adopt and assert what may be suggested for his benefit, objections to questions of this nature are of the highest importance; but where the matter to which the witness is examined is merely introductory of that which is material, it is frequently desirable to lead his mind directly to the subject; and where he is examined as to material facts, it is in general necessary, to some extent, to do this. Questions to which the answer yes or no would be conclusive, would certainly be objectionable; and so would any question which plainly suggested to the witness the answer which the party, or his counsel hoped to extract.^a Where a witness betrays a forwardness to serve the party for whom he is called, but does not know how best to effect his object, it is most essential to justice that he should not be

^a *Ogle v. Paleski*, Holt, C., 485; E. C. L. R. 3.

^b *Turner v. Pearte*, 1 T. R. 717; see note (u). But, if there were any thing like fraud on the part of the party producing the witness, the court will interfere; *Wade v. Simeon*, 2 C. B. 342; E. C. L. R. 52.

^c *Wright v. Doe dem. Tatham*, 7 Ad. & E. 330; E. C. L. R. 34; *Crease v. Barrett*, 1 C. M. & R. 919; *De Rutzen v. Farr*, 4 Ad. & E. 53; E. C. L. R. 31; *Horford v. Wilson*, 1 Taunt. 12; and *Edwards v. Evans*, 3 East, 451.

^a The objection in principle applies to those cases only where the question propounded involves an answer immediately concluding the merits of the case, and indicating to the witness an answer which will best accord with the interests of the party; see 2 Pothier, by Evans, 265.

prompted. And it is to be observed, that answers extracted by such improper means are of little advantage in general to the party in whose favour they are given, since evidence obtained from a partial witness by unfair means must necessarily be viewed with the utmost jealousy.

On the other hand, objections of this nature ought not to be wantonly or captiously made,* since it is, to some *extent, *167] always necessary to lead the mind of the witness to the

* *Nicholls v. Dowding*, 1 Stark. C. 81; E. C. L. R. 2. In order to prove that Dowding and Kemp were partners, the witness was asked whether Kemp had interfered in the business of Dowding; and upon the objection being taken that this was a leading question, Lord Ellenborough, C. J., held that it was a proper question, and intimated that objections of this nature were frequently made without consideration. It is not a very easy thing to lay down any precise general rule as to leading questions: on the one hand, it is clear that the mind of the witness must be brought into contact with the subject of inquiry; and, on the other, that he ought not to be prompted to give a particular answer, or to be asked any question to which the answer "yes" or "no" would be conclusive. But how far it may be necessary to particularize, in framing the question, must depend upon the circumstances of each individual case. Upon the trial of De Berenger and others, before Lord Ellenborough, at Guildhall, for a conspiracy, it became necessary for a witness (a postboy who had been employed to drive one of the actors in the fraud) to identify De Berenger with that person: and Lord Ellenborough held that, for this purpose, the counsel for the prosecution might point out De Berenger to the witness, and ask him whether he was the person. The same was done in *Watson's case*, upon a trial at bar; 2 Stark. C. 128; E. C. L. R. 3. In these cases, the question was as to a mere fact to be determined by *inspection*; and, in all such cases, it seems that the mind of the witness may be led directly to the very point, although a more general question might have been proposed, as, whether the witness saw the person whom he had described in court. So where a witness is called to prove the handwriting of another, it is the common practice to show him the document, and to ask, directly, whether that is the handwriting of A. B. But where a witness is examined as to any *conversation, admission, or agreement*, where the particular terms of the admission or contract are important, this objection chiefly becomes material, since there is danger lest the witness should by design or mistake be guilty of some variance, and give a false colouring to the transaction. In such cases there seems to be no objection to directing the mind of the witness fully to the subject, by asking him whether he was present when any conversation took place between the parties, or relating to the particular subject; and when the mind of the witness has been thus directed to the subject-matter, to request him to state what passed. It is obvious that observations like these are intended for the use of mere students; to such it may not be improper to suggest, that when the time and place of the scene of action have once been fixed, it is generally the easiest course to desire the witness to give his own account of the matter, making him omit, as he goes along, an account of what he has heard from others, which he always supposes to be quite as material as that which

subject of inquiry. In some instances the court will allow leading questions to be put upon an examination in *chief, as where it evidently appears that the witness wishes to conceal the [*168 truth, or to favour the opposite party.^p Thus a party's own witness who, having given one account of the matter, when called on the trial gives a different account, may be asked by the party calling him whether he had given such account, stating it, to the attorney.^q And if a witness called stands in a situation which, of necessity, makes him adverse to the party calling him, counsel may cross-examine him.^r Thus, where an issue has been *di- [*169 rected, with power to examine a party, the counsel of the opposite party may cross-examine him, for being a party, he is presumed to be an adverse witness.^s In like manner where, on an issue of *devisavit vel non* from the Court of Chancery, the party, in

he himself has seen. If a vulgar, ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood; and therefore his attention cannot easily be drawn so as to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal; but if his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time.

^p In *Clarke v. Saffery*, Ry. & M. 126; E. C. L. R. 21; Best, C. J., observed, "There is no fixed rule which binds the counsel calling the witness to a particular mode of examining him. If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination." And, in *Bastin v. Carew*, Ry. & M. 127; E. C. L. R. 21; Abbott, C. J., in allowing the cross-examination by the counsel who called him of an adverse witness, said, "that in each particular case there must be some discretion in the presiding judge, as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice." And see *Dickinson v. Shee*, 4 Esp. 67; *Parkin v. Moon*, 7 C. & P. 408; E. C. L. R. 32; *R. v. Chapman*, 8 C. & P. 558; E. C. L. R. 34; *R. v. Ball*, 8 C. & P. 745; E. C. L. R. 34.

^q *Melhuish v. Collier*, 19 L. J., Q. B. 493.

^r Per Best, C. J., *Clarke v. Saffery*, Ry. & M. 126; E. C. L. R. 21. The situation of the witness, and the inducements under which he may labour to give an unfair account, are material considerations in this respect. A son will not be very forward in stating the misconduct of his father, of which he has been the only witness. A servant will not, in an action against the master, readily admit his own negligence. See 2 Pothier, by Evans, 267.

^s *Clarke v. Saffery*, Ry. & M. 126; E. C. L. R. 21.

obedience to the requisition of that court, having called one, proceeded to call another attesting witness to the will, who gave evidence tending to prove the testator to have been insane, he was allowed to cross-examine him: the witness in such a case, not being regarded as the witness of the party, but rather of the court, and the party having no option as to producing him.⁴ And where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as when he is called to contradict another as to the contents of a particular letter which is lost, and cannot without suggestion, recollect the contents, the particular passage may be suggested to him.⁵ So where a witness is called in order to contradict the testimony of a former witness, who has stated that such and such expressions were used, or such *and such things were said, *170] it is the usual practice to ask whether those particular expressions were used, or those things were said, without putting the question in a general form by inquiring what was said. If this were not to be allowed, it is obvious that much irrelevant and inadmissible matter would frequently be detailed by the witness.

The negative, if not allowed to be directly proved, could only be proved indirectly, by calling on the witness to detail the whole of what was said on the particular occasion, if any such were singled out by the evidence, or to detail the whole of several such conversations, where the use of the alleged expressions or words was not limited to any conversation in particular; and, after all, the evidence would not be complete and satisfactory to establish the negative, unless sooner or later the question as to the use of the particular expressions were to be directly put, for till then the

⁴ *Per* Cresswell, J., *Bowman v. Bowman*, 2 M. & Rob. 501.

⁵ *Courteen v. Touse*, 1 Camp. 43. The plaintiff's son, in an action on a policy on goods, being asked whether the plaintiff had not written a letter to him, saying, "that he had disposed of all his goods at a profit," swore that he did not, but only said that "he might have disposed of the goods at a great profit, as he had been offered 8*d.* a pair," &c. To contradict this a witness was called by the defendant, and, after having stated all he recollected about the letter, he was asked if it contained anything about the plaintiff having been offered 8*d.* a pair, &c. Lord Ellenborough held that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained the passage recited; for otherwise it would be impossible to come to a direct contradiction. Where a witness was called to contradict a former witness as to a conversation which he had denied, it was held that the terms might be suggested to him in the first instance; *Edmonds v. Walker*, *cor.* Abbott, C. J., 3 Stark. 8; E. C. L. R. 3; but see *Hallett v. Cousins*, 2 M. & Rob. 238, *infra*, p. 171.

evidence would show only that the witness did not remember their use; but the direct negative, after the attention of the witness had been excited by the suggestion of the very expressions, would go much further. It may frequently happen that a witness, unable to detail even the substance of a particular conversation, may yet be able to negative with confidence proposals, offers, statements, or other matters, sworn to have been made in the course of a conversation. In such cases, therefore, this form of inquiry is absolutely necessary for obtaining complete information on the subject. So where a witness is called to prove affirmatively what a witness on the other side has denied, as, for instance, to prove that on some former occasion that witness gave a different account of the transaction, a difficulty may frequently arise in proving affirmatively that the first witness did make such other statement, without a direct question to that effect.

But although the practice above stated is, to a certain extent, sanctioned by a principle of convenience, and although, after other attempts have failed, it becomes a matter not of mere convenience but of absolute necessity *so to put the question to a witness called to contradict a former one, it is plain that the convenience so attained to is purchased at the expense of some departure from a general principle, and that it would usually be more satisfactory, where that is practicable, that the desired answer should be obtained without a direct suggestion, by which a fraudulent witness might be greatly aided. And it seems that the consideration of mere convenience ought not to operate at all where the contents of a particular document, or the details of a particular conversation, are material^x to the issue. As where the question in an action of

* Upon this principle, in *Hallett v. Cousens*, 2 M. & Rob. 238, a witness having denied on cross-examination that he had used certain expressions in a conversation at which the plaintiff and defendant were alleged to have been present, Erskine, J., considering that the conversation was evidence *per se*, and not proved for the simple purpose of discrediting the witness, held, that the very words could not be suggested to a witness called to prove that they had been used; and this seems perfectly consistent with principle, inasmuch as a party has a right to have every part of the conversation laid before the jury, which could in any way qualify or explain the expressions as to which the witness had been cross-examined (see *Prince v. Samo*, 7 Ald. & E. 627; E. C. L. R. 34; *post*): but it would also appear, from the same case, to be proper to lead the witness's mind to the particular matter, and direct him to confine his attention to that, as the party certainly has no right to have the whole of the conversation, if it involved independent matter.

assumpsit turns upon the terms of a lost written agreement, or on an alleged oral contract, *e. g.*, the warranty of a horse. In such cases each is interested in showing what the terms of the lost writing or conversation alleged to amount to a warranty really were; and as the attention of both parties would be previously drawn to the subject, there would be but little inconvenience in adhering to the ordinary course of examination, reserving the power to deviate where the necessity for deviation arose. And it is further observable that in the case of *Courteen v. Touse*,⁷ where Lord Ellenborough *172] ruled that the witness might be *asked whether a particular letter contained a passage sworn to by another witness, this was to be done after exhausting the witness's memory as to the contents of the letter. This decision, therefore, turned not upon a principle of convenience, but of necessity.

Another illustration of the general principle occurs where details are to be made of such length or difficulty that the memory of the witness will not enable him to give his testimony without assistance. Thus where a witness is called to prove a co-partnership between a number of persons whose names he cannot recollect, the list of names may be read to him, and he may be asked whether those persons are members of the firm.²¹

A witness is examined either as to facts, simply, which he himself knows, or in some instances as to his own inferences from

⁷ 1 Camp. 43, *supra*.

² *Acerro v. Petroni*, 1 Stark. C. 100; E. C. L. R. 2.

¹ In general the principles laid down in the text are sustained throughout by the American cases; *Snyder v. Snyder*, 6 Binn, 483; *People v. Mather*, 4 Wendell, 229; *McLean v. Thorp*, 3 Missouri, 315; *U. States v. Dickenson*, 2 McLean, 325; *Bank of Northern Liberties v. Davis*, 6 Watts & Serg. 285; *Towns v. Alford*, 2 Alabama, 378; *Sadler v. Murrah*, 3 How. Miss. 195; *Turney v. State*, 8 Smedes & Marshall, 104; *Strawbridge v. Spann*, 8 Alabama, 820; *Hopper v. The Commonwealth*, 6 Grattan, 684; *Able v. Sparks*, 6 Texas, 349; *Long v. Steiger*, 8 Ibid. 460; *Stringfellow v. State*, 26 Mississippi, 157; *Willis v. Quimby*, 11 Foster, 485. Putting a question in the alternative does not remove the objection to its being leading; *People v. Mather*, 4 Wendell, 229. A question to a witness proposed in the form "Whether or not" is not ordinarily objectionable as leading. It may be so, when proposed in that form, if it be otherwise in such terms, that from the nature of the question, in connection with its subject-matter, it suggests to the witness the answer desired; *Bartlett v. Hoyt*, 33 N. Hamp. 151. It is a matter within the discretion of the court, and the allowance of a leading question is not the subject of a writ of error, although the refusal to allow a party to put a leading question who is entitled to do so as on cross-examination, is: *Farborough v. Moss*, 9 Alabama, 382; *Sears v. Shafer*, 1 Barbour S. C. 408;

facts, or as to facts which he has heard from others. In ordinary cases the witness ought to be examined as to facts only, and not as to any opinion or conclusion which he may have drawn from facts, for those are to be formed by a jury, except indeed where the conclusion is an inference of skill and judgment.^a

A witness examined as to facts ought to state those only of which he has had personal knowledge; and such knowledge is supposed, if not expressly stated upon the examination in chief; and upon cross-examination, his means of knowledge may be fully investigated, and if he has not had sufficient and adequate means of knowledge, his evidence will be struck out. It has been said, that a witness must not be examined in chief as to his *belief* or *persuasion*, but only as to his knowledge of the fact, since judgment must be given *secundum allegata et probata*; and a man cannot be indicted for perjury who falsely swears as to his persuasion or belief.^b As far as regards mere belief or persuasion, which does not rest upon a sufficient or legal foundation, this position is *correct*; as where a man believes a fact to be true, merely because he has *heard* it said to be so; but with respect to persuasion or belief, as founded on facts within the actual knowledge of the witness, the position is not true. On questions of identity of persons, and of handwriting, it is every-day's practice for witnesses to swear that they believe the person to be the same, or the handwriting to be that of a particular individual, although they will not swear positively; and the degree of credit to be attached to the evidence is a question for the jury. And with regard to the second objection, it has been decided that a man who falsely swears that he thinks or believes, may be indicted for perjury.^c [*173]

So where professional men and others give evidence on matters of skill and judgment, their evidence frequently does not, and

^a *Goodtitle dem. Revett v. Braham*, 4 T. R. 497.

^b *Adams v. Canon*, Dyer, 53; note to *Rolfe v. Hampden*, Dyer, 53.

^c *Millar's case*, 3 Wils. 427; 2 Bl. 881; *Pedley's case*, 1 Leach, 327; *Reg v. Schlesinger*, 10 Q. B. 670; E. C. L. R. 59.

People v. Lohman, 2 Ibid. 216; *Donnell v. Jones*, 13 Alabama, 490; *Badlong v. Van Nastrund*, 24 Barb. S. C. 25.

Contra, *Parsons v. Bridgham*, 34 Maine, 240.

A judge at the trial may permit counsel, on a direct examination, to suggest to a witness names, dates, and items, provided that the witness has exhausted his memory, and the purposes of justice require such a course to be taken; *Huchins v. The People's Mutual Fire Ins. Co.*, 11 Foster, 238.

often cannot, from the nature of the case, extend beyond opinion and belief. But in general, wherever the inference is one of skill and judgment, the opinion of experienced persons is admissible, for by such means only can the jury be enabled to form a correct conclusion.

The general distinction is this, that the jury must judge of the facts for themselves, but that wherever the question depends on the exercise of peculiar skill and knowledge that may be made available, it is not a decision by the witness on a fact to the exclusion of the jury, but the establishment of a new fact, relation, or connection, which would otherwise remain unproved. Not to admit such evidence, would be to reject what was essential to the investigation of truth. Thus an engineer may be examined as to his judgment on the effect of an embankment on a harbour, as *174] collected from experiment.^d So *upon the question whether a seal has been forged, the testimony of a seal-engraver, as to the difference between the impression in question and a genuine one, is also admissible.^e In like manner a ship-builder may be examined to state his opinion as to the sea-worthiness of a ship, from a survey made by others.^f So the testimony of medical men is constantly admitted with respect to the cause of disease, or of death, in order to connect them with particular acts, and as to the general sane or insane state of the mind of the patient, as collected from the number of circumstances. Such opinions are admis-

^d *Folkes v. Chadd*, Mich. 23 Geo. III., 3 Dougl. 157; E. C. L. R. 26; Vol. II. tit. HANDWRITING.

^e By Lord Mansfield, in *Folkes v. Chadd*, 3 Dougl. 157; E. C. L. R. 26. Such evidence is also admissible to show whether a particular handwriting is natural and genuine, or forged and imitated; *Cary v. Pitt*, Peake, Ev. lxxxv.; *R. v. Cator*, 4 Esp. C. 117. But in *Gurney v. Langlands*, 5 B. & A. 330; E. C. L. R. 7, the Court held, that the opinion of an inspector of franks, whether a particular writing was in a forged or imitated hand, was of little weight; and see further, *Doe v. Suckermore*, 5 Ad. & E. 751; E. C. L. R. 31. But antiquaries may be called to express their opinion as to the date at which an apparently ancient document was written (*Tracy Peerage case*, 10 Cl. & Fin. 191); and the opinion of a person in the habit of receiving letters is, it seems, evidence of the genuineness of a postmark; *Abbey v. Lill*, 5 Bing. 299; E. C. L. R. 15. But see further, as to postmarks, which are not evidence *per se* without proof, *R. v. Watson*, 1 Camp. 215; *Woodcock v. Houldsworth*, 16 M. & W. 124; *Kent v. Lowen*, 1 Camp. 178; *Fletcher v. Braddyll*, 3 Stark. 64; E. C. L. R. 3; *Plumer's case*, R. & R. C. C. 264.

^f *Thornton v. Royal Exchange Assurance Company*, Peake's C. 37; *Chaurand v. Angerstein*, 44; *Beckwith v. Sydebotham*, 1 Camp. 117.

sible in evidence, although the professional witnesses found them entirely on the facts, circumstances, and symptoms established in evidence by others, and without being personally acquainted with the facts.⁸ But in such a case evidence is not admissible that a particular act for which a prisoner is tried was an act of insanity.⁹ And, in general, scientific men ought to be examined only as to their opinion *on the facts proved, and not as to the merits [*175 of the case.¹¹

⁸ *Wright's case*, Russ. & Ry. C. C. L. 456; *R. v. Searle*, 1 Mood. & Rob. 75; and see *M'Naghten's case*, 10 Cl. & Fin. 200.

⁹ *Ibid.*

¹¹ Thus, in an action for unskilfully navigating a ship, a master of the Trinity House, or other nautical man, cannot be asked whether, having heard the evidence, he considers the ship was improperly navigated, for that would be requiring him to draw a conclusion of fact and then to give an opinion upon it, and would make him a judge not only of the matter of skill and science but also of the truth of the facts in dispute; but he may be asked what was the duty of a captain under certain specified circumstances; *Sills v. Brown*, 9 Car. & P. 604; E. C. L. R. 38; or whether, admitting the facts as proved by the plaintiff to be true, he is of opinion that a collision could have been avoided by proper care on the part of defendant's servants; *Fenwick v. Bell*, 1 Car. & K. 312; E. C. L. R. 47. And see *Malton v. Nesbit*, 1 Car. & P. 70; E. C. L. R. 12; *Jameson v. Drinkald*, 12 Moore, 148; E. C. L. R. 22. So where the sanity or insanity of an individual is the point to be decided by the jury, and medical men who previously knew nothing of the prisoner, but have heard the evidence, are called on to give an opinion, the proper course is not to ask them what their opinion is as to the state of mind of the party, for that would necessarily assume and involve the truth of the evidence which it is for the jury, and not the witnesses, to weigh and decide, but they should be asked what is their opinion, assuming the facts stated by the witnesses to be true, as to his state of mind; *M'Naghten's case*, 10 Cl. & Fin. 200; 1 Car. & K. 135; E. C. L. R. 47. Where, however, the truth of the facts is not disputed, and the question remaining is one almost exclusively of science, it is usual to allow the question to be thus broadly put, though, if objected to, it could not be insisted upon. If doubts exist as to the accuracy of some of the facts, it may perhaps be well in propounding the question to the witnesses to exclude those facts from their consideration; and see *Wheeler v. Alderson*, 3 Hagg. Eccl. R. 574.

¹ Persons of skill are allowed to give their opinion in evidence, only in cases where, from the nature of the subject, facts disconnected from such opinions cannot be so presented to a jury as to enable them to pass upon the question with the requisite knowledge and judgment; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72. Persons skilled in the knowledge of handwritings are competent to testify concerning them, although they never saw the parties write; *Hess v. The State of Ohio*, 5 Ohio Rep. 6. So a practical surveyor in testifying respecting marks on trees or piles of stones may express his opinion whether they were intended as monuments of boundaries; *Davis v. Mann*, 4 Pick. 156. In an action for the materials found in building a house and the labour done in erecting it, the testimony of master

In order likewise to prove the law of a foreign country, or even of Scotland,^k where it does not depend upon the statutes of the United Kingdom, the only proper¹ evidence* is that of men conversant^m with the law of the particular country. Upon such a question,ⁿ as well as any other question of science, books of science cannot be received in evidence, yet a witness may be asked as to his judgment, although his means of judging may be derived partly from books.^{o1}

^k *Dalrymple v. Dalrymple*, 2 Hagg. 54; *Reg v. Dent*, 1 Car. & K. 97; E. C. L. R. 47.

¹ *Baron de Bode's case*, 8 Q. B. 208; E. C. L. R. 55; *Sussex Peerage case*, 11 Cl. & Fin. 85. These authorities overrule *Clegg v. Levy*, 3 Camp. 166; *Millar v. Heinrich*, 4 Camp. 155; *Picton's case*, 30 Howell, St. T. 225; *Boehtlinck v. Schneider*, 3 Esp. 58, where it was thought that the written law of a foreign country must be proved by properly authenticated documents. *The Sussex Peerage case* also overrules *R. v. Dent*, so far as the latter case admitted a person not *peritus virtute officii* or *virtute professionis* to prove foreign law.

^m *Sussex Peerage case*, 11 Cl. & Fin. 85; *Bristow v. Secqueville*, 19 L. J., Ex. 289; *Vanderdonckt v. Thellusson*. *ib.* C. P. 12.

ⁿ *Sussex Peerage case*, 11 Cl. & Fin. 85.

^o *Collier v. Simpson*, 5 C. & P. 73; E. C. L. R. 24; which was an action for imputing want of skill to a medical man. And he may refer to them for the purpose of refreshing his memory; *Sussex Peerage case*, 11 Cl. & Fin. 114.

builders, who had examined the house and made an estimate of the expense of erecting it, is admissible to ascertain the amount of damages; *Tebbetts v. Haskins*, 16 Shepley, 283. In an action for a breach of warranty of the soundness of a horse a witness called to give an opinion relative to the defects of a horse's eyes, stated that he was not a farrier, but that he professed to understand when he tried a horse, whether his eyes were good or not, though there might be diseases of the eyes of horses with which he was unacquainted; *held* that the witness might be examined; *House v. Fort*, 4 Blackf. 293. G.

¹ Foreign laws cannot be judicially noticed, but must be proved as facts, and in making such proof the general principle is applicable, that the best evidence the nature of the case admits of must be given. But this rule may be relaxed or changed as necessity either physical or moral may require, and when a rigid adherence to it may produce extreme inconvenience or manifest injustice; *Phillips v. Gregg*, 10 Watts, 158; *Dyer v. Smith*, 12 Conn. Rep. 384; *Talbot v. Seeman*, 1 Cranch, 1; see also *Chanoine v. Fowler*, 3 Wendell, 173; *Lincoln v. Battelle*, 6 Wend. 475; *Hasford v. Nicholls*, 1 Paige, 220; *Malpica v. McKown*, 1 Louis. Rep. 255; *Newson v. Adams*, 2 Id. 154 *Taylor v. Swett*, 2 Id. 30; *Dougherty v. Snyder*, 15 Serg. & Rawle, 84. A printed copy of the Irish statutes, with the oath of a barrister in Ireland, that he received them from the King's printer in Ireland, and that they are good evidence there, was held admissible in evidence; *Jones v. Maffet*, 5 Serg. & Rawle, 523. But although as a general rule, the written statutes and edicts of foreign countries must be produced; common or unwritten laws may be proved by parol; *Robinson v. Clifford*, 2 Wash. C. C. Rep. 1; see also *Dyer v. Smith*, *Supra*; *Consequa v.*

But where the inquiry relates to a subject which does not require peculiar habits of study, in order to enable a man to understand it, the opinion of skilled or scientific witnesses is not admissible. Thus, where an alleged libel imputed, *inter alia*, that a physician in refusing to act with the plaintiff as a physician had well and faithfully discharged his duty to his medical brethren, the defendant cannot in support of a plea of justification examine a medical witness as to his opinion on the subject.^p And so the opinion of a broker, whether particular facts ought to have been disclosed to the underwriter, was held inadmissible.^q So the opinion of skilled persons upon the construction of a legal instrument is inadmissible; *e. g.*, the opinion of a witness as to the effect of a clause in a policy of insurance.^r

Although a witness cannot be examined as to the contents of a written document not produced, yet he may, in some instances, be examined as to the general result from *a great number of [*177 documents too voluminous to be read in court.^s

^p *Ramadge v. Ryan*, 9 Bing. 333; E. C. L. R. 23; but see an instance in which such an opinion may be incidentally introduced; *Greville v. Chapman*, 5 Q. B. 731; E. C. L. R. 48.

^q *Carter v. Boehm*, Burr. 1905; 1 Smith, Lead. Cas. 270; *Campbell v. Rickards*, 5 B. & Ad. 840; E. C. L. R. 27; reviewing *Rickards v. Murdock*, 10 B. & C. 527; E. C. L. R. 21; see *Chapman v. Walton*, 10 Bing. 57; E. C. L. R. 25.

^r *Syers v. Bridge*, Doug. 527. But the practice under similar circumstances would be legal evidence. *Ibid.*

^s *Meyer's Assignees v. Sefton*, 2 Stark. C. 276; E. C. L. R. 3; *Roberts v. Doxon*, Peake's C. 83; *Spencer v. Billing*, 3 Camp. 310. And so in *Rowe v. Brenton*, 3 Man. & Ry. 212, a witness called to read and explain a series of ancient records which were produced, was allowed to state what he had collected to be the result of them from his perusal. But in *Topham v. M'Gregor*, 1 C. & K. 320, Rolfe, E. C. L. R. 47, B. refused to allow a witness to be examined generally as to the contents of a number of letters which he had received from one of the parties, but had destroyed, for the purpose of ascertaining the impression produced on his mind by them with reference to the terms on which two parties lived together.

Willing, Peter's C. C. Rep. 225; *Seton v. Delaware Ins. Co.*, 2 Wash. C. C. Rep. 175. But the construction of a foreign law is matter for the court, and not the jury; *Sidwell v. Evans*, 1 Penna. Rep. 388. No court gives effect to the local laws of another country or State, in respect to the forms or force of process. When the right exists the remedy is to be pursued according to the *lex fori*, where the suit is brought; *Hinkley v. Marian*, 2 Mason's C. C. Rep. 890. In two cases only can foreign laws affect the contracts of American citizens: First, when they reside or trade in a foreign country; and secondly, when the contract plainly referring to a foreign country for its execution, adopts and recognizes the *lex loci*: *Searight v. Calbraith*, 4 Dallas, 325; see also *Webster v. Massey*, 2 Wash. C. C. Rep. 157.

Although in general, leading questions are not to be put to a witness, yet, where his memory has failed, he may, even during examination, read, or, if necessary, hear the contents of a document read, for the purpose of reviving his former recollection. And if by that means he obtains a recollection of the facts themselves as distinct from the memorandum, his statement is admissible in evidence.¹ A witness is, of course, competent to testify as to his actual present recollection of a fact, although in the interval his memory may have failed, and although such defect, and the means of restoration may be the subject of comment in cases to which any suspicion is attached. The law however goes further, and in some instances permits a witness to give evidence as to a fact, although he has no present recollection of the fact itself. This happens in the first place where the witness having no longer any recollection of the fact itself, is yet enabled to state that at some former time, and whilst he had a perfect recollection of that fact, he committed it to writing. If the witness be correct in that which he positively states from present recollection, viz., that at a prior time he had a perfect recollection, and having that recollection, truly stated it in the document produced in writing, though its contents are thus but mediately proved, must be true. Such evidence, though its *178] reception be warranted by sound principles, is not in *ordinary cases² as strong and satisfactory as immediate testi-

¹ See *R. v. St. Martin's, Leicester*, 2 Ad. & E. 210; E. C. L. R. 29. In many cases, such as where an agent has been employed to make a plan or map, and has lost the items of actual admeasurement, all he can state is, that the plan or map is correct, and has been constructed from materials which he knew at the time to be true; and see *Horne v. Mackenzie*, *post*, p. 182, n. (g).

² *Feeter v. Heath*, 11 Wend. 478. It is proper for a witness, who swears to the correctness of his notes of a transaction, and that without them his recollection of the facts is indistinct, to read those notes to the jury; *Rogers v. Burton, et al.*, Peck's Rep. 108. A witness will be permitted to refer to a summary of his testimony given on a former trial for the purpose of reviving his recollection; *Riordon v. Davis*, 9 Louis. Rep. 242. But a witness for plaintiff has no right to refresh his memory by reference to the plaintiff's books, when it does not appear that the entries were made by the witness; *Pargaud v. Guice*, *Adv.* 6 Louis. Rep. 77. G.

Welcome v. Batchelder, 10 Shepley, 85; *Vastbinder v. Metcalf*, 3 Alabama, 100; *Lawrence v. Bates*, 5 Wend. 301; *Owings v. Shannon*, 1 A. K. Marshall, 188; *Columbia v. Harrison*, 2 Rep. Const. Ct. 213; *Babb v. Clemson*, 12 Serg. & Rawle, 328; *Key v. Lynn*, 4 Litt. 338; *Kendall v. Stone*, 2 Sandf. Sup. Ct. 269; *Neil v. Childs*, 10 Iredell, 195; *Rutherford v. The Branch Bank*, 14 Alabama, 92; *Huff v. Bennett*, 2 Selden, 337; *State v. Lull*, 37 Maine, 246; *George*

mony, for in such cases, the witness professing to have no recollection left as to the facts themselves, there is less opportunity for cross-examination, and fraud is more easily practised.¹

There is also a class of cases where the testimony of a witness is admissible to prove a fact, although he has neither any recollection of the fact itself, nor mediate knowledge of the fact, by means of a memorial of the truth of which he has a present recollection. This happens where the memorandum is such as to enable the witness to state with certainty that it would not have been made had not the fact in question been true.. Here the truth of the evidence does not wholly depend on the contents of the document itself, or on any recollection of the witness of the document itself, or of the circumstances under which it was made, but upon a conviction arising from the knowledge of his own habits and conduct sufficiently strong to make the existence of the document wholly irreconcilable with the non-existence of the fact, and so to convince him of the affirmative.

Thus, in proving the execution of a deed or other instrument (one of the most ordinary and cogent cases within this class,) where a witness called to prove the execution of a deed sees his signature to the attestation, and says he is thereby sure that he saw the party execute the deed, that is a sufficient proof of the execution of the

v. *Loy*, 19 N. Hamp. 544. The book or paper used to refresh memory need not be produced at the trial; *Howland v. The Sheriff of Queen's County*, 5 Sandf. 219; *The State v. Cheek*, 13 Iredell, 114.

Contra, *Harrison v. Middleton*, 11 Grattan, 527.

¹ When a witness, of his own free will and accord, draws up a memorandum or has it drawn up under his immediate direction at the time of the fact, or soon afterwards, for the purpose of preserving the memory of it, he may adopt its contents as his testimony; although at the time of testifying he recollects nothing further than that he had accurately reduced or procured to be reduced the whole transaction to writing. But if the paper was drawn up weeks after the fact occurred, or if it was drawn up, or procured to be drawn up, by the party in whose favour the witness is called to give evidence, he cannot be allowed to testify to its contents, if he does not recollect them independently of the paper; *O'Neal v. Walton*, 1 Richardson, 234. Where ship timber was sold, without being scheduled or set apart from similar timber with which it was mingled, a witness called to identify the timber who was unable to do it except by a schedule made some months after the sale, and even with that having no present recollection of the articles enumerated, was admitted; *Glover v. Hamnewell*, 6 Pick. 222; *Downes v. Rowell*, 24 Vermont, 343; *Seavy v. Dearborn*, 19 N. Hamp. 351; *Webster v. Clark*, 10 Foster, 245; *State v. Colwell*, 3 Rhode Isl. 132; *Tuttle v. Robinson*, 33 N. Hamp. 104; *Bartlett v. Hoyt*, Ibid. 151; *Halsey v. Sinsebaugh*, 1 Smith (N. Y.) 485; *Heart v. Hammel*, 3 Barr, 414. Contra, *Reddon v. Spruance*, 4 Harrington, 217.

deed, that is a sufficient proof of the execution of the deed, although the witness should add that he has no recollection of the fact of the execution of the deed." The admission of such evidence* is not confined to attestations of the execution of written instruments.^x A plaintiff called a bankrupt in an action against his assignees to prove the receipt of £20 by him from the plaintiff; the witness stated that £20 had been received from the plaintiff, and not carried to account. A rough cash-book of the plaintiff's was then put into the witness's hands, containing the entry, "4th Nov. 1822, Debtor *R. Lancaster*, check £20, *R. L.*;" the witness then said, "The entry of £20 in the plaintiff's book has my initials, written at the time. I have no recollection that I received the money. I know nothing but by the book; but, seeing my initials, I have no doubt that I received the money." An objection was made to the reading of the paper without the stamp was overruled, Lord Tenterden being of opinion that, though it was not in itself admissible evidence to prove the payment of the money, the witness might use it to refresh his memory, and that his saying he had no doubt that he had received the money was sufficient evidence of the fact. On a motion for a new trial, Lord Tenterden said, "Here the witness, on seeing the entry signed by himself, said he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory, and when he had said that he had no doubt that he had received the money, there was sufficient parol evidence to prove the payment."

It is of course essential that the witness should be enabled, upon seeing the memorandum or other entry, to swear positively to the truth of the fact, although he has no present independent recollection of it.^y

It is not essential that the memorandum should have been contemporary with the fact. It seems to be sufficient if it has been made by the witness, or by another with his *privity, at a time^z when the facts were fresh in the recollection of the

^u *Per* Bayley, J., in *Maugham v. Hubbard*, 8 B. & C. 14; E. C. L. R. 15; and see *Bringloe v. Goodson*, 5 Bing. N. C. 738; E. C. L. R. 35.

^x *Maugham v. Hubbard and others, Assignees of Lancaster*, 8 B. & C. 14; E. C. L. R. 15.

^y *R. v. St. Martin's Leicester*, 2 Ad. & E. 210; E. C. L. R. 29; *Maugham v. Hubbard*, 8 B. & C. 14; E. C. L. R. 15.

^z *Wood v. Cooper*, 1 Car. & K. 645; E. C. L. R. 47; *Smith v. Morgan*, 2 M. & Rob. 257. In the case of *Sandwell v. Sandwell*, Comb. 445, Lord Holt is reported

witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory,* or enables him to swear to the truth of the fact.¹ Neither, is it necessary that the paper should have been written by the witness himself, provided he recollects having seen it when his memory as to the facts was still fresh, and he remembers that he then knew the statement to be correct.² A deposition formerly made by an aged witness was allowed to be read to him at the trial, in order to refresh his memory:³ and

to have said, that the memorandum must have been made presently; and in *Whitfield v. Aland*, 2 Car. & K. 1015; E. C. L. R. 61, it was held that the entry, if not contemporaneous, should be nearly so, and if it has been made at some time subsequently at the instigation of the party or his attorney, the witness will certainly not be allowed to use it; *Steinkeller v. Newton*, 9 Car. & P. 313; E. C. L. R. 38.

* *Tanner v. Taylor*, 3 T. R. 754; 8 East, 284; *Doe v. Perkins*, 3 T. R. 749; *Sandwell v. Sandwell*, Comb. 445; *Rambert v. Cohen*, 4 Esp. C. 213; *Duchess of Kingston's case*, 20 How. St. T. 355; *Henry v. Lee*, 2 Chit. 124; *Jones v. Stroud*, 2 C. & P. 196; E. C. L. R. 12; *R. v. Hedges*, 28 How. St. T. 1367. So a person who has from time to time examined entries in a log-book, whilst the events were fresh in his recollection, may refer to the book to refresh his memory when examined as to a fact recorded there, and which he remembers to have seen there when he had a clear recollection of the circumstances; *Burrough v. Martin*, 2 Camp. 112.

^b *Burton v. Plummer*, 2 Ad. & Ell. 341; E. C. L. R. 29; *Burrough v. Martin*, 2 Camp. C. 112; *Jacob v. Lindsay*, 1 East, 460; *Howard v. Canfield*, 5 Dowl. 417; *Henry v. Lee*, 2 Chit. 124; *Duchess of Kingston's case*, 20 How. St. T. 619. A witness may refresh his memory from notes of counsel taken at a former trial; *Lawes v. Reed*, 2 Lew. C. C. 152. But Lord Tenterden would not allow the memory of a witness, who had denied that he had been sentenced to imprisonment in France, to be refreshed by showing him a copy of the sentence of the French Court; *Meagoe v. Simmons*, 3 Car. & P. 75; E. C. L. R. 14.

^c *Vaughan v. Martin*, 1 Esp. C. 440; see *Doe v. Perkins*, 3 T. R. 749; but see 2 M. & Rob. 257. A witness was allowed to refer to his deposition taken before

¹ A witness will be allowed to refer to a report of experts of whom he was one which has been set aside, for the purpose of refreshing his memory, when the fact to be proved was what estimate he had put on the work done, the reference being as to a memorandum deliberately made at the time; *Riorden v. Davis*, 9 Louis. R. 242. See also *Glover v. Hunnewell*, 6 Pick. 222. G.

² In South Carolina, it is held, that when a witness has made a memorandum at the time of the happening of certain facts, for the purpose of perpetuating the memory of them, and can at a subsequent period swear that he made the entry at the time for that purpose and that he knows from that memorandum that the facts did exist; it will be good evidence, though the witness does not retain a distinct recollection of the facts themselves, and the rule is the same in criminal as in civil cases; *State v. Rawle*, 2 Nott & McCord, 331. M.

*181] where a *witness who had received money, and given a receipt for it, which could not be read in evidence for want of a proper stamp, had become blind, the receipt was read to him in court for a similar purpose.^a And where the plaintiff had entered an account in writing of goods and money from time to time forwarded to the defendant, and the defendant had, by his signature at the foot of each page, admitted the truth of the items, but the writing itself could not be given in evidence for want of receipt of stamps, as the cash items in each page exceeded 40s., yet it was held that the plaintiff might prove, that upon calling over each article to the defendant he admitted the receipt, and that the witness who heard him might refresh his memory by referring to the account.^e So where a person employed to let lands read over the terms to the defendant from a written paper, he was allowed to refresh his memory by that document.^f

Whether the writing be used merely as an instrument for restoring the recollection of a fact, or be offered to be read as containing a true account of particulars entirely forgotten, it must, in conformity with the general principle *of evidence, be the
*182] *best* for the purpose that the case admits of. For although it be plain that if the recollection of a forgotten fact be completely restored, the means of restoration are immaterial, yet, where the questions are, whether knowledge of the fact once existed, and whether it will be restored by the means proposed, it is obvious that such restoration is more likely to be accomplished by a genuine than by a false, or even imperfect memorandum, and that a false suggestion made by such means is more likely to create an errone-

commissioners of bankruptcy, to refresh his memory as to a date, *Wood v. Cooper*, 1 C. & K. 645; E. C. L. R. 47; but not to go through the whole; *Smith v. Morgan*, 2 M. & Rob. 257. Whether in a criminal case the prisoner's counsel may offer a deposition to a witness on examination to refresh his memory, *quære*. Denied by Parke, B., and Coltman, J., York, S. Assizes, 1837. Admitted by Paterson, J., at a former assizes; and in a subsequent case at the same assizes, admitted by Parke, B., and Coltman, J.—Mr. Starkie's Note, 3rd edit. vol. i. p. 601.

^a *Catt v. Howard*, 3 Stark. C. 3; E. C. L. R. 3. Where a witness to prove the receipt of money, after having denied all recollection of it, was shown a written entry with his initials, and then said he had no doubt of his having received the money; held that it was not necessary such paper should be stamped, after being looked at to refresh his memory; the parol evidence to prove the payment was sufficient; *Maugham v. Hubbard*, 8 B. & C. 14; E. C. L. R. 15.

^e *Jacob v. Lindsay*, 1 East, 460; *supra*, tit. STAMP.

^f *Lord Bolton v. Tomlin*, 5 Ad. & E. 856; E. C. L. R. 31.

ous than to restore a correct impression. The general principle, therefore, operates to the exclusion of the inferior evidence. Where the object is not to restore recollection, but to get at the contents of a writing, on the ground that the witness knows those contents to be true, it is in effect to give the writing in evidence, and consequently to give force to the objection that it is not the best evidence the case admits of. Two steps are essential in such a case to the truth of the conclusion; first, that the witness knows that the fact was truly stated on a former occasion in some particular document; secondly, that the document produced contains that statement; and the best evidence of this is by the production of the original document. In conformity with this principle, it has been held that a mere copy of a writing,^c *although made by the witness himself, cannot be used for the purposes.^b [*183

^c The rule does not extend to the exclusion of a duplicate original, and in practice a witness is admitted to refresh his memory, as to items of goods delivered, by a copy recently taken by him from a shop-book, or other documents of his own writing, or written with his knowledge. And where *A.* having made a survey furnished a report to his employers, and being afterwards called as a witness produced a printed copy of it, in the margin of which he had, two days before, to assist him in giving explanations, made some jottings, and this report was made up from his original notes, and was in substance, though not in words a transcript of them, the House of Lords held that he might look at such printed copy to refresh his memory; *Horne v. Mackenzie*, 6 Cl. & Fin. 628. And where an editor of a newspaper swore that *A.* wrote the article in question, but the MS. had been lost, and *A.* stated that he had been in the habit of writing such articles, and that they were all true, but he did not recollect the article in question; he was allowed by Rolfe, B., to refresh his memory with the newspaper; *Topham v. M'Gregor*, 1 C. & K. 320; E. C. L. R. 47.

^b In the case of *Burton v. Plummer*, 2 Ad. & E. 343; E. C. L. R. 29, Patterson, J., observed; "The copy of an entry not made by the witness contemporaneously, does not seem to me to be admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced, and that rule appears to me to be applicable, whether a paper be produced as evidence in itself, or to be used merely to refresh the memory. In the case of *Doe v. Perkins*, 3 T. R. 752, Lord Kenyon cited a case in Chancery, where a motion was made to suppress a deposition on a certificate from the commissioners that the witness refreshed her memory by minutes, consisting of six sheets of paper of her own handwriting, the substance of which she declared she had set down from time to time as the facts occurred to her memory; that five of the six sheets were drawn up in the form of a deposition by the plaintiff's solicitor, whom she had requested to digest her notes, and reduce them to some order; and that, after he had done so, she transcribed and altered them wherever it was necessary to make them consistent with her meaning, and that the Lord Chancellor, in giving judgment, said: "Should the Court connive at proceedings like these, depositions would really be

In analogy to the ordinary rules of documentary evidence, a copy may be used to refresh the memory, on proof that the original has been lost. Yet, in one instance, it was heldⁱ that a copy made by the witness himself six *months after the fact, from his own *184] memorandum made at the time of the fact, could not be used, although the witness swore that the original was lost, and was at the time of the loss illegible, being covered with figures.

Where a witness refreshes his memory from memoranda, it is usual and reasonable that the adverse counsel should have an opportunity of inspecting them^k for the purpose of cross-examining the witness;^l and he is entitled to cross-examine not only as to the particular part referred to, but as to other parts of the entry.^m

no better than affidavits, for should a witness be permitted to use a paper, especially one drawn up by the attorney of one of the parties, though from memoranda furnished by the witness, I might as well let the attorney draw an affidavit for her, and use that instead of a deposition. To be sure, in some cases, a man may use papers at law, but I have known some Judges (and, I think, I adhered chiefly to that rule myself) let them use only papers drawn up as the facts happened, and all other papers I have bid them put in their pockets; and if any had been offered which had been drawn by the attorney, I should have reprimanded him severely. As to dates and names, which are merely technical, it is quite another thing." In *Solomons v. Campbell, cor. Abbott, J.*, Sitt. after Mich. 1822, also, a witness was not allowed to refresh his memory by a copy taken from a shopbook, neither of the entries having been written by himself.

ⁱ *Jones v. Stroud*, 2 C. & P. 196; E. C. L. R. 12; and see *Burton v. Plummer*, 2 Ad. & E. 343; E. C. L. R. 29; and also *contra*, *Wood v. Cooper*, 1 C. & K. 646; E. C. L. R. 47; *R. v. Kinloch*, 25 How. St. T. 937.

^k Where a party possessed the means, the recollection of the witness would of course be refreshed before the trial, and then if he testified as to his having an actual present recollection of the fact, it would of course be unnecessary, as regards his testimony in chief, to refer to the means by which his recollection was restored after it had once been lost. Where such means were wanting, or the defect was not anticipated, the attempt may be made, as above stated, at the trial; but as the license might be used for the purpose of putting leading questions or suggestions in the most objectionable form, and facility might, by such means, be given to fraudulent testimony, it is expedient that opportunity should be afforded for the prevention of abuse.

^l *Per Eyre, C. J.*; *Hardy's case*, 24 Howell's St. Tr. 824; *R. v. Ramsden*, 2 C. & P. 603; E. C. L. R. 12; *Sinclair v. Stevenson*, 1 C. & P. 582; E. C. L. R. 12; see *Howard v. Canfield*, 5 Dowl. P. C. 417. But if the question founded upon the memoranda wholly fail, the adverse counsel has no right to see them; *Reg. v. Duncombe*, 8 C. & P. 369; E. C. L. R. 34.

^m *Lloyd v. Freshfield*, 2 C. & P. 325; E. C. L. R. 12. But if he cross-examine as to other entries in the same book, he makes them his own evidence; *Gregory v. Tavernor*, 6 Car. & P. 280; E. C. L. R. 25.

Where the memory of a witness has been *refreshed* previous to the trial, it is not necessary that the writing by means of which this was done should be produced at the trial;" the omission to produce it would of course afford matter for observation. Where the witness has *no* distinct *recollection* of a fact independently of the writing, the writing itself must be produced.*

*A witness may also in some instances, on principles which have already been adverted to, be examined as to [*185 what he has *heard* from others; and evidence of this nature is either *original evidence*, which is admissible without previous proof to warrant it, or is merely *secondary*, and admissible only in failure of some other and superior evidence, which is no longer attainable. Of the first description is evidence of reputation, of declarations *which accompany and explain material facts, and of de- [*186 clarations made by the adverse party in the cause.†

† See *Kensington v. Inglis*, 8 East, 273.

* *Doe v. Perkins*, 3 T. R. 749. The question was, at what time the annal holding of several tenants expired. Aldridge had gone round with the receiver of the rents to the different tenants, whose declarations as to their times of entry were noted down in a book, some by Aldridge and some by the receiver. Aldridge was examined as to these declarations, the original book not being in court; he admitted that he had no recollection on the subject, except from extracts made by him from the book; and the evidence was afterwards held by the Court of K. B. to have been inadmissible.

In the above case, that of *Tanner v. Taylor* was cited, which had been decided by Legge, B., Hereford Spring Assizes, 1751; where, in an action for goods sold and delivered, the witness who proved the delivery took it from an account which he had in his hand; being a copy, as he said, of the day-book which he had left at home; and Mr. Baron Legge held, that if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make oath of it; but if he could not from recollection swear to the deliveries any further than as finding them entered in his book, then the original should have been produced; and the witness saying he could not swear from recollection, the plaintiff was nonsuited. In *Beech v. Jones*, 5 C. B. 696, E. C. L. R. 57, a banker's clerk was called to give secondary evidence that a bill was made payable at Mold. He stated that on the preceding day he had looked at an entry in his own handwriting, made when the bank received the bill, which had been redelivered to the defendant, which entry described the bill as payable at Mold; but he admitted that he had no recollection whatever of the bill or its contents, save what he derived from the entry. The book not being produced, it was objected that evidence in its absence was not admissible; but Coltman, J., having admitted it, the Court of C. P. granted a new trial, on the authority of *Doe v. Perkins*. And see a case cited from Lord Ashburton's notes, 3 T. R. 752; *Rex v. Duchess of Kingston*, 20 How. St. Tr. 355; 8 East, 289; *Kensington v. Inglis*, 8 East, 273; *Hedge's case*, 28 How. St. Tr. 1367.

† See tit. **ADMISSIONS**.

Evidence of reputation, subject to the limitations already stated,¹ is admissible upon questions as to the boundaries of parishes, manors, or other districts in which many persons possess an interest;¹

¹ It will be seen, from what has been already observed on this subject, that the term *reputation*, as denoting a class of evidence, has acquired a technical sense, which differs in some respects from the ordinary sense of the term, and includes all evidence, whether oral or written, which on principles already adverted to is admissible to prove matters of public and general interest.

The cases on this subject will be found under the heads of REPUTATION—PEDIGREE—PRESCRIPTION—HIGHWAY—COMMON—MANOR, and other particular titles to which the decisions relate.

² See Vol. II. tit. CUSTOM. Hearsay evidence is admissible on a question of parochial or manorial boundary, although the persons who have been heard to speak of the boundary were parishioners, and claimed rights of common on the very wastes which their declarations have a tendency to enlarge; *Nicholls v. Parker*, 14 East, 331; *Brisco v. Lomax*, 8 Ad. & E. 198; E. C. L. R. 35; *Evans v. Rees*, 10 Ad. & E. 151; E. C. L. R. 37; *Thomas v. Jenkins*, 6 Ad. & E. 525; E. C. L. R. 33. So on a question of boundary between old and new land in a manor; *Barnes v. Mawson*, 1 M. & S. 77.

Where, in trespass for levying a distress for rates claimed to be due on lands in the parish *A.*, the question was whether they were situate in that or the adjoining parish *B.*; it was held, that being a question of boundary, in which reputation was admissible, leases granted by the deceased ancestors of the plaintiff's landlord, describing the land to be situated in *B.*, were properly received in evidence; also, that the accounts of deceased overseers of *B.*, to which the tenants of the lands were successively assessed, and against whose names crosses were made, were admissible in evidence of payment of such rates by them, as a common mode of denoting payment; *Plaxton v. Dare*, 10 B. & C. 17; E. C. L. R. 21. A book of leases of the Dean and Chapter, kept in the chapter-house, is evidence as reputation on a question of boundary; *Coombs v. Coether*, M. & M. 398; E. C. L. R. 22. Upon the question, whether a particular place be parcel of a parish, old entries made by a churchwarden, not charging himself, relating to the repairs of a chapel alleged to belong to the place in question, are not admissible; *Cooke v. Bankes*, 2 C. & P. 478; E. C. L. R. 12. But orders of Justices at Sessions are evidence to prove a district to be parcel of a hundred; *Duke of Newcastle v. Hundred of Broxtowe*, 4 B. & Ad. 273; E. C. L. R. 24. Such evidence is not, however, evidence to prove the boundary of a private estate; *Clothier v. Chapman*, 14 East, 331, n.; *Donnison v. Elsley*, 3 Eag. & Yo. Tithe Cases, 1393,

¹ General reputation is admissible as evidence in cases of boundary; *Standin v. Bains*, 1 Hayw. 238; *Tate v. Southard*, 1 Hawks. 45; *Beard's Lessee v. Talbot*, Cooke's Rep. 142. But not to contradict record evidence on the subject; *Lessee of McCay, v. Galloway*, 3 Ohio Rep. 282. So also what has been said by a deceased person in relation to a boundary is admissible as evidence; *Caufman v. Congregation of Cedar Spring*, 6 Binn. 59; *Wolf v. Wyeth*, 11 Serg. & Rawle, 149. But declarations respecting a boundary by a person living, and who might be produced are not evidence; *Buchanan v. More*, 10 Serg. & Rawle, 275. G.

upon questions *relating* to rights of common,* or other customary rights" or obligations, upon questions as to public [*187

where the testimony of a witness derived from hearsay as to the extent of boundaries and parcels of an estate was rejected; though in *Davies v. Lewis*, 2 Chitty, 35, E. C. L. R. 18, hearsay evidence was admitted upon the question whether a particular place was parcel of a sheep-walk. As this, however, was a question of mere private right, the authority of this case seems to be very doubtful. And, in *Thomas v. Jenkins*, 6 Ad. & E. 525, E. C. L. R. 33, where the boundary of an estate was proved to be the same as that of two hamlets, the court held, that though reputation would not have been admissible as evidence to prove the boundaries of the estate, *per se*, yet it was evidence to prove the boundaries of the hamlet, and through that medium admissible; *Steel v. Prickett*, 2 Stark. C. 466; E. C. L. R. 3.

* It is evidence equally to prove or disprove the right asserted; *Drinkwater v. Porter*, 7 C. & P. 181; E. C. L. R. 32; *Marquis of Anglesea v. Lord Hather-ton*, 10 M. & W. 218.

* See Vol. II. tit. COMMON, where the cases are set forth. A paper signed by many deceased copyholders of a manor, importing what was the general right of common in each copyholder, and agreeing to restrict it, is evidence of reputation, even against other copyholders not claiming under those who signed it; *Chapman v. Cowland*, 13 East, 10. So reputation is evidence of a right of common *pur cause de vicinage* between two manors; *Prichard v. Powell*, 10 Q. B. 589; E. C. L. R. 59. But in *Lord Dunraven v. Llewellyn*, 19 L. J., Q. B. 388, the Court of Exchequer Chamber held that reputation was not admissible evidence on a question as to common appendant, that not being a *customary*, but a mere private right derived from some grant; and observed that the reasons given for the judgment in *Weeks v. Sparke*, 1 M. & S. 679, in which such evidence was admitted on the like question, would certainly not be satisfactory at the present day.

" Reputation is evidence on questions respecting general customs concerning parishes or manors, or the inhabitants of towns and other places; *Morewood v. Wood*, 14 East, 327, n. Thus, where it is contended that, by the custom of a manor, land shall descend to the eldest female heir, general reputation of such custom, and instances of its having so descended on some occasions, is evidence proper to be left to a jury, though the descent contended for in the particular instance is not exactly similar to any of those that are adduced in evidence; as where the estate is claimed by the grandson of an eldest sister, and the instances proved are only of descents to eldest daughters and eldest sisters; *Doe ex dem. Foster v. Sisson*, 12 East, 62. In a suit between a copyholder and his lord, the copyholder rested his case upon an immemorial custom of the manor, the existence of which the lord denied. At the trial the lord produced the record of a suit by bill in the Exchequer, 4 W. & M., wherein the parties litigant were described as lord and copyholder (of the same manor), and the parties deposing for the copyholder were so described, that if the description were true, they were legally competent to give evidence touching the customs of the manor. Their depositions went to prove a custom inconsistent with that relied upon by the now plaintiff; and to disprove the existence of such last-mentioned custom, the lord offered them as evidence. It was objected: 1. That the present parties were not privies to the record of the former suit, and therefore could not be affected by any matter therein

#188] highways,^{2*} questions of pedigree,⁷ questions as to rights of toll,² and of some other questions of public and general interest.²¹

contained; it was *res inter alios acta*. 2. Or supposing that the depositions were admissible as evidence of reputation, still that it must be shown that the parties were invested with the characters described in the depositions, and not having which, they were incompetent to depose. 3. Or even waiving the two former objections, that the depositions were inadmissible in evidence, being declarations made *post litem motam*. The objections were overruled: because, 1. The depositions were not offered as a record estopping the plaintiff, but as declarations of deceased persons, touching a reputation or received opinion: their simple assertions would have been evidence; *à fortiori* those made under the sanction of an oath. 2. That at the distance of time, the fact that the witnesses were clothed with the character in which they deposed must be taken for granted; else it would be requiring a proof which, in all probability, it were impossible to adduce. 3. The two customs—the one litigated in the former, the other in the present suit—were different; the declarations, therefore, though made after the first custom was questioned, were made before the controversy touching the present was raised; *Freeman v. Phillips*, 4 M. & S. 486. Upon a question as to the custom of tithing in the parish of *A.*, evidence that such a custom exists in the adjacent parishes is not admissible. *Secus*, if the custom be laid as the general custom of the whole country; *Furneaux v. Hutchins*, Cowp. 807. But where a right is claimed by custom in a particular manor or parish, proof of a similar custom in an adjoining parish or manor is not admissible evidence; *Furneaux v. Hutchins*, Cowp. 807; Dougl. 512; *Doe d. Foster v. Sisson*, 12 East, 62; *Marquis of Anglesea v. Lord Hatherton*, 10 M. & W. 218.

* See tit. HIGHWAY; *Reed v. Jackson*, 1 East, 356; *R. v. Bliss*, 7 Ad. & E. 550; E. C. L. R. 34. Such evidence is admissible upon an indictment for not repairing a public bridge, to show that it is a public bridge; *R. v. Sutton*, 8 Ad. & E. 516; E. C. L. R. 35; although, in one case, this seems to have been doubted; *R. v. Antrobus*, 2 Ad. & E. 794; E. C. L. R. 29. So, to prove a public right of landing on a particular spot; *Drinkwater v. Porter*, 7 C. & P. 181; E. C. L. R. 32.

⁷ See PEDIGREE.

² A deed under the seal of the University of Cambridge, between them and the town of Cambridge, relating to the tolls in question was held admissible as evidence of reputation respecting them; *Brett v. Beales*, M. & M. 417; E. C. L. R. 22; see Vol. II. tit. PRESCRIPTION.

²¹ Such evidence has been received concerning the jurisdiction of a court upon a question whether it was or was not a court of record; *Rogers v. Wood*, 2 B. & Ad. 245; E. C. L. R. 22; *Braine v. Dew*, 2 Peake's C. 204. To prove a custom

¹ Evidence of hearsay is admissible in order to prove pedigree; *Strickland v. Poole*, 1 Dall. 14. So also in favour of freedom; *Jenkins v. Tom*, 1 Wash. 123; *Gregory v. Baugh*, 4 Rand. 611. But evidence of hearsay from the father or mother is not admissible in a question of age; *Albertson v. Robeston*, 1 Dall. 9. Nor for the purpose of proving a person's birth-place; *The Inhabitants of Wilmington v. The Inhabitants of Burlington*, 4 Pick. 174. Common reputation is the best evidence of the state of a man's property when collaterally questioned; *State v. Cochryn*, 2 Dev. 63.

*It is not essential to the reception of such evidence, where it is adduced in proof of a right, that a foundation [*189
*should previously have been laid by evidence of enjoyment, but without such proof, evidence of this kind is of [*190
little weight.^b It is usually essential to the reception of evidence of any declaration or entry falling within this description, that it should have been made *ante litem motam*;^c but the circumstance

of a corporation to exclude foreigners from trading in a particular place; *Davis v. Morgan*, 1 C. & J. 587; or a right in a recognized body of persons to unload or deliver certain goods brought to a port; *Laybourn v. Crisp*, 4 M. & W. 320; or a right in the lord to all the coals under a certain district of a manor; *Barnes v. Mawson*, 1 M. & S. 77; or a right of free warren over all the copyhold lands in a manor; *Lord Carnarvon v. Villebois*, 13 M. & W. 313; or a right to a public ferry; *Pim v. Currell*, 6 M. & W. 234; or a parochial or district *modus*; *Moseley v. Davies*, 11 Price, 162; *Rudd v. Wright*, 1 Phill. on Ev. 9th edit. 240; but not a farm *modus*, *Wells v. Jesus College, Oxford*, 7 C. & P. 284; E. C. L. R. 32. So, to prove a liability to repair a sea wall; *R. v. Leigh*, 10 Ad. & E. 398; E. C. L. R. 37; or to disprove a liability to repair a public bridge *ratione tenuræ*; *R. v. Sutton*, 8 Ad. & E. 516; E. C. L. R. 35; or to prove a mining custom in a particular district; *Crease v. Barrett*, 1 C. M. & R. 919; and upon an issue whether *A.* was a parochial chapelry, evidence by a witness of what he had heard a former incumbent say respecting the chapelry was held admissible, the right involved being of a public nature; *Carr v. Mostyn*, 5 Ex. 69. But, in *R. v. Antrobus*, 2 Ad. & E. 788, E. C. L. R. 29, on the trial of an information against the sheriff of a county for not executing a convict under sentence of death, it was held that a witness could not be examined as to his having heard that it was the custom for the sheriff to be exempted from performing, and for another to perform the duty in that county; although proof had been given that another had always performed it within the time of living memory, because, as was said, the public were not interested in the question which officer was to perform the duty. Lord Holt, in *Harcourt's case*, Comb. 902, admitted evidence of reputation to prove, in an action of *ejectione firmæ* for a rectory, that the plaintiff was in holy orders, proof having been previously given of presentation, admission, and institution, and of the reading of the articles. Such a fact seems, however, to be more properly the subject of presumption than of proof by reputation; see the *Bishop of Meath v. Lord Belfield*, B. N. P. 295. Evidence of reputation that the land in question had belonged to a particular individual, and been purchased of him by an alleged testator, has been held to be clearly inadmissible; *Doe v. Thomas*, 14 East, 323.

^b *Crease v. Barrett*, 1 C. M. & R. 919; *per cur.* *Lord Dunraven v. Llewellyn*, 19 L. J., Q. B. 388.

^c *Berkeley Peerage case*, 4 Camp. 401; *Slaney v. Wade*, 1 Myl. & Cr. 338; *Freeman v. Phillips*, 4 M. & S. 486; *Richards v. Bassett*, 10 B. & C. 657; E. C. L. R. 21. But although this be generally true as to mere traditional declarations, the rule is not, and indeed cannot be applicable to verdicts and judgments which fall within the general description of evidence by reputation; see *Reed v. Jackson*, 1 East, 356. Cases of this description stand, in fact, upon a foundation somewhat different from ordinary declarations or entries by private persons. On this subject some observations will afterwards be made.

that it was made with the express intention of preventing dispute,^a or that it was made by a person whose title it supports,^o or that it was made by one who was, or believed himself to be *in pari jure* with the party relying on the declaration,^r will not exclude the evidence.

*191] *In other cases a witness may be examined as to matter of hearsay, where the evidence is admissible as secondary evidence.^s Such evidence is in some instances admissible to prove the testimony given by a witness in a former suit between the same parties, who is since deceased;^h but in this, as well as in all other cases where such secondary testimony is admitted, it is necessary to lay the foundation, by previous proof, that the superior evidence, in place of which the secondary evidence is offered, is no longer attainable. In order to warrant the reception of evidence of what a deceased witness swore on a former trial between the same parties, it is necessary to prove, not only the death of that witness, but also that the testimony was given in a cause legally depending between the same parties.ⁱ After such evidence has been given, parol evidence of what the deceased witness swore upon the former trial is admissible.^k

Previous also to the admission of evidence of traditionary declarations, which the witness has heard made by others, it is necessary to prove the deaths of the parties who made them. And where the declarations of deceased persons are admissible on special grounds, the circumstances which warrant the reception of the evidence require collateral proof.^l

^a *Berkeley Peerage case*, 4 Camp. 418; *Monkton v. Attorney-General*, 2 Russ. & M. 147, 164; *Slaney v. Wade*, 1 M. & C. 338.

^o *Doe d. Jenkins v. Davies*, 10 Q. B. 314; E. C. L. R. 59.

^r *Monkton v. Attorney-General*, 2 Russ. & M. 159.

^s *Supra*, part i. cap. 3. But evidence cannot be given of declarations by a deceased person, that a document purporting to be attested by him was actually forged by him; *Stobart v. Dryden*, 1 M. & W. 615.

^h *Lord Palmerston's case*, cited 4 T. R. 290; *Mayor of Doncaster v. Day*, 3 Taunt. 262.

ⁱ See below, tit. JUDICIAL PROCEEDINGS—DEPOSITION.

^k Where a witness on a former trial of an issue out of Chancery died, and a new trial was granted, parol evidence of what such witness had sworn was held to be admissible, notwithstanding an order for reading the depositions of such witnesses had died since the first trial; *Tod v. Winchelsea, Earl of*, 3 C. & P. 387; E. C. L. R. 14.

^l For instances where such evidence is admissible, and the nature of the proof previously requisite to warrant its admission, see below, tit. ENTRIES BY THIRD PERSONS.

It has already been seen that the law, upon grounds of [*192 *policy,^m in some instances, precludes a witness from revealing matters of political or professional confidence. And, therefore, upon a trial for high treason, it was held that although a witness who had made communications in order to their transmission to the Government, might be properly asked whether he had made such communication to any magistrate, and that he could be further asked to whom he made such communication; yet a majority of the judges^o were of opinion that on the witness having admitted that he had communicated what he knew to a friend, which friend had advised him to make the same communication to another; and having stated that such friend was not a magistrate, he could not be asked who that friend was, on the ground that the person by whose advice the information was given to a person standing in the situation of a magistrate, was in effect the informer. So a witness who has been employed by an officer to collect evidence as to the proceedings of suspected persons, is not allowed to disclose the name of his employer, or the nature of the connection that subsisted *between them.^p The rule of pub- [*193 lic policy, which protects a witness from being asked such questions as would disclose the informer, if he were a third person, equally applies to questions which would disclose whether the witness himself gave the information; therefore, on an information by Attorney-General for a breach of the revenue laws, a witness for the Crown cannot be asked, in cross-examination, "Did you give

^m Where a commander-in-chief directed the defendant (a major-general) with six other officers, to inquire into the conduct of the plaintiff, and to report the opinion of those officers, which was done accordingly, and the plaintiff brought an action for an alleged libel contained in that report, and the secretary of the commander-in-chief attended with the minutes of the report, the Court refused to allow it to be read, *Home v. Bentinck*, 2 B. & B. 130; E. C. L. R. 6. So official communications between the governor and law-officer of a colony as to the state of the colony, *Wyatt v. Gore*, Holt's C. 299; E. C. L. R. 3; or between a governor and a military officer under him, *Cooke v. Maxwell*, 2 Stark. C. 183; E. C. L. R. 3; or between an agent of government and a secretary of state, *Anderson v. Sir W. Hamilton*, 2 B. & B. 156; E. C. L. R. 6, are privileged; or the East India Company and the Board of Control, *Smith v. The East India Company*, 1 Phill. 50; or an officer of customs and the commissioners.

ⁿ *Hardy's case*, 24 How. St. Tr. 808; *R. v. Watson*, 32 How. St. Tr. 100.

^o The Lord Chief Baron Macdonald and Buller, J., were of opinion that the question was proper; Lord C. J. Eyre, Mr. Baron Hotham, and Mr. J. Grose, were of a different opinion.

^p *R. v. Hardy*, 24 How. St. Tr. 753.

the information?"¹ But there is no such privilege in cases where the communication was not made in the discharge of official duty, or where its disclosure does not violate official confidence.²

In some other instances also, witnesses on grounds of general policy, are not allowed to be examined. Thus a member of Parliament cannot be cross-examined as to what has passed in Parliament.³ And upon the same principle it would, no doubt, be held that a privy councillor could not be examined as to disclosures made before the queen in council.⁴ Lord Kenyon is in one instance reported to have held that it was competent to the plaintiff's counsel, in an action for a malicious prosecution, to inquire of a grand juror whether the defendant was prosecutor of an indictment,⁵ being of opinion that an answer to such an inquiry would not infringe upon the witness's official oath.⁶ But Lord Ellenborough, C. J., has since said that he had doubts upon the point, and many eminent men had entertained doubts upon it.⁷ And grand jurors have not been allowed to disclose who, or how many were present when a case was brought before them, or who agreed, or refused to find the bill of indictment;⁸ neither can they be called to detail the evidence on which the bill was found,⁹ or to show that a witness gave before them evidence different from that he has given on the trial,¹⁰ or to explain their find-

¹ *Att.-General v. Briant*, 15 M. & W. 169.

² *Blake v. Pilfold*, 1 M. & Rob. 198.

³ *Plunkett v. Cobbett*, 29 How. St. Tr. 71. The action was for a libel; and on the defendant's inquiring on cross-examination as to expressions used by the plaintiff in parliament, Lord Ellenborough observed that it would be a breach of duty in the witness, as a member of the (Irish) parliament, and a breach of his oath, to reveal the councils of the nation.

⁴ Evidence was permitted to be given by a privy councillor against Lord Strafford, of confidential advice given by the latter to the King at the council-table; 4 Inst. 54: a proceeding justly reprobated by Lord Clarendon.

⁵ *Sykes v. Dunbar*, 2 Sel. N. P. 1075, 11th ed.; *Freeman v. Arkell*, 1 C. & P. 137; E. C. L. R. 12. See *Lee v. Birrell*, 3 Camp. 337, where it was held that a clerk to Commissioners of Taxes was bound to produce his books and answer all questions relevant to the matter, notwithstanding his oath of office.

⁶ "The King's counsel, your own, and your fellows' you shall keep secret."

⁷ *Watson's case*, 32 How. St. Tr. 107.

⁸ *R. v. Marsh*, 6 Ad. & E. 236; E. C. L. R. 33.

⁹ *R. v. Watson*, 32 How. St. Tr. 107.

¹⁰ 12 Vin. Abr. Evid. H.

¹ As to privilege of officers of justice. *United States v. Moses*, 4 Wash. C. C. 726.

ing.^o And the clerk attending the grand jury is included in the same rule.^d

So it has been seen that the law, on grounds of extrinsic policy, prohibits the disclosure of confidential communications between a counsel, or an attorney and his client;^o and also usually prohibits a husband or wife from giving testimony against the other.^f

When the witness has been examined in chief, the adverse party is at liberty to cross-examine him.^e The *power and opportunity to cross-examine, it will be recollected, is one of the [*195 principal tests which the law has devised for the ascertainment of truth, and this is certainly a most efficacious test. By this means the situation of the witness with respect to the parties and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discerning facts in the first instance, and his capacity for retaining and describing them, are fully investigated, and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing the manner and demeanour of the witness; circumstances which are often of as high importance as the answers themselves.^h It is not easy for a witness who is subjected to this test, to impose upon the court; for how-

^o *R. v. Cooke*, 8 C. & P. 584; E. C. L. R. 34.

^d 12 Vin. Abr. Evid. B. a. 5.

^e *Supra*, and see Vol. II. tit. CONFIDENTIAL COMMUNICATIONS. In the case of *Curry v. Walter*, 1 Esp. C. 456, Eyre, C. J., held that it is at the option of a barrister, whether he will give evidence of what he stated to the Court upon making a motion. *Qu.*

^f *Supra*, and see Vol. II. tit. HUSBAND AND WIFE.

^g In criminal cases the right to cross-examine is not strictly confined to witnesses who have been examined in chief. For, although the prosecutor is not bound to call all the witnesses whose names are on the back of the bill of indictment, the judge may do so, and in that case the prisoner's counsel may cross-examine them; *R. v. Simmonds*, 1 C. & P. 84; E. C. L. R. 12; *R. v. Beezley*, 4 C. & P. 220; E. C. L. R. 19; *R. v. Bull*, 9 C. & P. 22; E. C. L. R. 38; *R. v. Vincent*, 9 C. & P. 9; E. C. L. R. 38. The judge may call such a witness for the purpose of suffering him to be cross-examined, although he has not been examined before the grand jury; *R. v. Bolle*, 6 C. & P. 186; E. C. L. R. 25; and even although the witness's name be not on the back of the indictment; *R. v. Holden*, 8 C. & P. 609; E. C. L. R. 34; *R. v. Chapman*, *ib.* 558; *R. v. Orchard*, *ib.* 559; *R. v. Stroner*, 1 C. & K. 650; E. C. L. R. 47. But the prisoner's counsel, having cross-examined him, cannot call witnesses simply to contradict him; *R. v. Bodle*, 6 C. & P. 186; E. C. L. R. 25.

^h Bac. Abr. Ev. E.; Hob. 325; Vaugh. Rep. 143.

ever artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended; the fraud is therefore open to detection for want of consistency between that which has been invented, and that which the witness must either represent according to the truth, for want of previous preparation, or misrepresent according to his own immediate invention. In the latter case, the imposition must obviously be very liable to detection; so difficult is it to invent extemporaneously, and with a rapidity equal to that with which a series of questions is proposed, in the face of a court of justice, and in the hearing of a listening and attentive multitude, a fiction consistent with itself and the other evidence in the cause.¹

*[196] A witness when once called, sworn and examined, although merely as to the formal proof of a document, may be cross-examined, although he be the substantial party in the cause.¹² And it has been held, that if a witness has once been called into the box and sworn, he may be cross-examined by the opposite side, although he has not been examined in chief.^k But it has since been ruled, that where a witness is merely called to produce a writing in his possession, and no question is asked, he need not be sworn, and the adverse party is not entitled to cross-examine.¹ And even when

¹ *Morgan v. Brydges*, 2 Stark. C. 314; E. C. L. R. 3. So in a criminal case; *R. v. Brooke*, 2 Stark. C. 472; E. C. L. R. 3.

^k *Phillips v. Eamer*, 1 Esp. C. 357; *R. v. Brooke*, 2 Stark. C. 472; E. C. L. R. 3.

¹ *Simpson v. Smith, cor. Holroyd, J.*, Nottingham Summer Ass. 1822, 2 Phil. on Ev. 397, 9th ed.; and *per Bayley, J.*, Lancaster Spring Assizes, 1824. In an action for a malicious prosecution, the magistrate who committed the plaintiff was called to produce the information, but was asked no question, and the learned judge held that the defendant's counsel were not entitled to cross-examine him; *Davis v. Dale*, Mood. & M. 514; E. C. L. R. 22; 4 C. & P. 335; E. C. L. R. 19; see also *Summers v. Moseley*, 2 Cr. & M. 477; *Rush v. Smith*, 1 Cr. M. & R. 94; *Perry v. Gibson*, 1 Ad. & E. 48; E. C. L. R. 28. So in criminal cases; *R. v. Murlis*, Moo. & M. 515; E. C. L. R. 22.

¹ Evidence obtained in a direct examination is not admissible when the witness dies before there is an opportunity for a cross-examination; *Kissam v. Forrest*, 25 Wend. 651.

² Where a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but he may examine him as to any matter embraced in the issue; and the party who originally called such witness and availed himself of his testimony, cannot subsequently object to him on the ground of interest any more than he can impeach his general character; *Fulton Bank v. Stafford*, 2 Wend. 483; *Varrick v. Jackson*, Wend. 666, and 7 Cow. 238.

a witness is sworn by mistake: and the mistake is discovered before any question is put, the same rule applies:^m also where a witness was sworn, and having answered an immaterial question was stopped by the judge, this was held to give no right to cross-examine him.ⁿ And where, before the passing of Lord Denman's Act, in an action by the assignees of a bankrupt, the petitioning creditor was called for the purpose of producing the bill of exchange on which the debt was founded, the court would not permit him to be cross-examined by the defendant, since he could not have been examined by the plaintiffs.^o But, in general, if the witness be sworn, and would be a competent witness for *the party calling him, the adversary will be entitled to cross-examine [*197 him, although he has not been examined in chief,^p unless he was sworn by mistake.^q

The courts do not usually exclude a party on the cross-examination of a witness from putting leading questions, although the witness betrayed an anxiety to serve that party; it is however obvious that evidence so obtained is very unsatisfactory, and is open to much observation.^r Although upon cross-examination a counsel may put leading questions, those questions must not assume facts to have been proved which have not been proved,

^m *Wood v. Mackinson*, 2 M. & Rob. 273; *Clifford v. Hunter*, 3 C. & P. 16; E. C. L. R. 14.

ⁿ *Creedy v. Carr*, 7 C. & P. 65; E. C. L. R. 32.

^o *Reed v. James*, 1 Starkie's C. 132; E. C. L. R. 2.

^p *Phillips v. Eamer*, 1 Esp. C. 357; *R. v. Brooke*, 2 Stark. C. 473; E. C. L. R. 3.

^q *Clifford v. Hunter*, 3 C. & P. 16; E. C. L. R. 14; *Rush v. Smith*, 1 Cr. M. & R. 94.

^r I have heard Lord Tenterden, C. J., express himself to that effect more than once. In *Hardy's case*, 24 How. St. R. 755, upon a trial for high treason, a witness having been called for the prosecution who was favourable to the prisoner, and who had been a member of the Corresponding Society, was asked whether particular expressions, which were suggested to him, had not been used by the members of that society, and Lord Chief Justice Eyre informed the counsel that he could not put words into the mouth of the witness, and that this was contrary to the practice of the court, and to his opinion. And Buller, J., upon the same trial, said, "You may lead a witness, upon cross-examination, to bring him directly to the point as to the answer; but not go the length, as was attempted yesterday, of putting into the witness's mouth the very words which he is to echo back again." In the late case of *Parkin v. Moon*, 7 C. & P. 408, E. C. L. R. 32, Alderson, B., said: "I apprehend you may put a leading question to an unwilling witness on the examination in chief, but you may always put a leading question in cross-examination, whether a witness be willing or not."

or that particular answers have been given contrary to the facts.* The witness cannot be cross-examined as to the contents of a written document which is not produced;† nor as to the contents of a written document which is in the hands of the adversary, and which he has had notice to produce; for this is part of the case of the party who cross-examines, which cannot be gone into until that of his adversary has been concluded.

It has been said, that where a witness has been examined by one party, he may afterwards be cross-examined by the same party as an adverse witness, when he is called by the adversary as one of his own witnesses.‡ If a party omit, from prudential motives, to examine his adversary's witness as to any branch of his own case, there seems to be no reason why, when he afterwards adopts him as his own witness, he should not be so considered to all purposes, and why the adversary should not then be entitled to cross-examine him. The same witness may know distinct parts of the transaction, one branch of which makes for the plaintiff, and the other for the defendant; and if each party call him as his own witness, there seems to be no reason why each should not be in turn bound by the same principle; why each, in examining into his own case, should not be precluded from putting leading questions, and be entitled to cross-examine as to his adversary's case.¹ And when a witness on the bill was tendered, but not examined by the prosecutor, and was examined for the prisoner, it was held he might be cross-examined by the prosecutor.²

The mode of examination is, in truth, regulated by the discre-

* *Hill v. Coombe*, cor. Abbott, J., Exeter Spring Assizes, 1818; *Handley v. Ward*, cor. Abbott, L. C. J., Lancaster Spring Assizes, 1818.

† *Sainthill v. Bound*, 4 Esp. C. 74. But the right of cross-examination is not limited to the matter as to which the witness has been examined in chief, even in equity; *The Mayor, &c., of Berwick upon Tweed v. Murray*, 19 L. J., Chan. 281.

‡ *Dickinson v. Shee*, 4 Esp. C. 67.

¹ *R v. Harris*, 7 C. & P. 581; E. C. L. R. 32.

¹ A party cannot introduce his case to the jury by cross-examining the witnesses of the adverse party; *Ellmaker v. Buckley*, 16 Serg. & Rawle, 72; *McKinley v. McGregor*, 3 Whart. 369; *Hartness v. Boyd*, 5 Wend. 563. G.

If a party wishes to examine a witness of the opposite side with regard to new matter not introduced by the opposite party, he must make the witness his own by introducing him in a subsequent part of the cause; *Philadelphia and Trenton Railroad Co. v. Stimpson*, 14 Peters, 448; *Hartness v. Boyd*, 5 Wend. 563; *Floyd v. Bovard*, 6 Watts & Serg. 75; *Castor v. Bavington*, 2 Ibid. 505; *Rucker v. Eddings*, 1 Missouri, 115; *Beal v. Nichols*, 2 Gray, 262.

tion of the court, according to the disposition and temper of the witnesses; the court frequently permitting, as before stated, an adverse witness to be cross-examined by the party who calls him.

For the purpose of furthering the object of cross-examination, the court will, in general, at the instance of either party,^a direct that the witnesses shall be examined each *separately, apart from the hearing of the rest;^a a strong test to try the consistency of their account;^b and the same indulgence may be granted to a prisoner, but not as a matter of right.^c An order of exclusion does not extend to an attorney in the cause, if his presence in court be necessary.^d Where a witness remains in court after an order for the exclusion of witnesses, the rejection or admission of his testimony is a question for the discretion of the judge under all the circumstances of the case;^e *thus, where the witness remained from mistake, and from no

^a The court will order the witnesses on the part of the defendant out of court even after the plaintiff's case is closed; *Taylor v. Lawson*, 3 C. & P. 543; E. C. L. R. 14; *Williams v. Hulie*, 1 Sid. 131. So either party at any period of the trial may require witnesses to be ordered out of court; *Southey v. Nash*, 7 C. & P. 632; E. C. L. R. 32.

^a *Attorney-General v. Bulpit*, 9 Price, 4; *Taylor v. Lawson*, 3 C. & P. 543; E. C. L. R. 14. In the House of Lords, no witness but the person under examination is allowed to be present; *Ib.* It is almost a matter of right to have the witness ordered out of court when an argument is going on respecting his evidence; *R. v. Murphy*, 8 C. & P. 307; E. C. L. R. 34.

^b No falsehoods are so difficult to be detected as those which are mixed up with a great portion of truth; the greater the proportion which the true facts bear to the false ones, the less opportunity will there be to detect the false by comparison with facts ascertained to be true. An ingenious mode of proving an *alibi* with consistency has long been known and practised by roguish adepts. The intended witnesses meet and pass the afternoon or evening together in convivial entertainment: when they are afterwards examined, they are all consistent as to the circumstances which attended their meeting, for so far they relate nothing more than the truth; they misrepresent nothing but the time when the transaction took place, which, for the purpose of the *alibi*, is of course represented to be that of the robbery.

^c *R. v. Cook*, 13 How. St. Tr. 348; *R. v. Gooden*, 17 How. St. Tr. 1015.

^d *Pomeroy v. Baddeley*, Ry. & M. 430; E. C. L. R. 21; *Everett v. Lowdham*, 5 C. & P. 91; E. C. L. R. 24; *R. v. Webb*, Sarum Summer Ass. 1819, *cor.* Best, J., *contra*.

^e A new trial in one case was granted because a witness's testimony had been rejected on that ground; *per* Alderson, B., in *Cooke v. Nethercote*, 6 C. & P. 741; E. C. L. R. 25; and the case reported in the note; see also *Beaman v. Ellice*, 4 C. & P. 585; E. C. L. R. 19; *R. v. Wylde*, 6 C. & P. 380; E. C. L. R. 25; *Thomas v. David*, 7 C. & P. 350; E. C. L. R. 32; *R. v. Colly*, Mood. & M. 329;

undue motive, his testimony was received.* But where, after witnesses had been ordered out of court, one had returned, and heard another give his evidence, the judge allowed him to be examined as to facts not sworn to by any previous witness, but with liberty to move to enter a nonsuit.⁵ In the Court of Exchequer, however, the rule for the rejection of such a witness, whether for the Crown or the defendant, in revenue cases, is known, and inflexible.^{h1}

It is here to be observed, that a witness is not to be cross-examined as to any distinct collateral fact for the purpose of afterwards impeaching his testimony by contradicting him; for this would render an inquiry, which ought to be simple, and confined to the matter in issue, intolerably complicated and prolix, by causing it to branch out into an indefinite number of collateral issues.² In the case of *Spencely v. Willot*,ⁱ which was a penal action

E. C. L. R. 22. The witness is liable to attachment for contempt; *Chandler v. Horne*, 2 M. & Rob. 423.

¹ *R. v. Cully*, Moo. & M. 329; E. C. L. R. 22.

² *Beamon v. Ellice*, 4 C. & P. 585; E. C. L. R. 19.

³ *Attorney-General v. Bulpit*, 9 Price, 4; *Parker v. McWilliam*, 6 Bing. 683; E. C. L. R. 19; *Thomas v. David*, 7 C. & P. 351; E. C. L. R. 32.

¹ 7 East, 108. See Mr. J. Holroyd's observations on the case, 2 Stark. C. 156; E. C. L. R. 3; *Harris v. Tippet*, 2 Camp. 638. It is an acknowledged law of evidence, said Lord Cottenham, C., in giving judgment in the House of Lords in *Tennant v. Hamilton*, 7 Cl. & Fin. 122, that you cannot go into an irrelevant inquiry for the purpose of causing a collateral issue to discredit a witness produced on the other side. The object of the action (a Scotch one) was to try a question of nuisance to a garden said to be injured by vapour emitted from a neighbouring manufactory. A witness called for the defendants had been examined as to other gardens and premises in the neighbourhood, and had said that he knew Glasgow Field, but never knew of any damage done there. The pursuer then proposed to ask him whether he had ever known of any sum having been paid by the defendants to the proprietors of Glasgow Field for alleged damage there occasioned by the works. The House of Lords, for the reason above assigned, held that the question could not be put. But although the question appear to be irrelevant to the issue, it is to be allowed, if counsel undertake to show by other evidence that it is relevant; *Haigh v. Belcher*, 7 C. & P. 389; E. C. L. R. 32.

¹ As to the separate examination of witnesses, see *Anon.*, 1 Hill, (S. C.) 251; *State v. Sellers*, 2 Halst. 220; *The State v. Sparrow*, 3 Murph. 487; *The State v. Brookshire*, 2 Alabama, 303; *Keith v. Wilson*, 6 Missouri, 435; *Nelson v. State*, 2 Swan. 237.

² A witness cannot be asked a collateral question, irrelevant to the matter in issue, merely to test his credibility; *Odiorne v. Winkley*, 2 Gall. 31; *Lawrence v. Barker*, 5 Wend. 301; *Radford v. Rice*, 2 Dev. & Bat. 39; *Jones v. McNeil*,

for usury, the defendant's* counsel were not permitted to cross-examine as to other contracts made on the same days with other persons, in order to show that the contracts in question were of the same nature, and not usurious, if the witness answered one way, or to contradict him if he answered the other way. And should such questions be answered, evidence cannot afterwards be adduced for the purpose of contradiction.^k The same rule obtains, if a question as to a collateral fact be put to a witness for the purpose of discrediting his testimony; his answer must be taken as conclusive, and no evidence can be afterwards admitted to contradict it.¹¹ Thus, in an information under the revenue* laws, a witness who had given material evidence as to the fact in

* *Harris v. Tippet*, 2 Camp. 638, 639; *R. v. Watson*, 2 Stark. C. 149; E. C. L. R. 3; *Hughes v. Rogers*, 8 M. & W. 123; *Lee's case*, 2 Lew. C. C. 154; *Harrison v. Gorton*, *ibid.* 156.

¹ *R. v. Watson*, 2 Stark. C. 149; E. C. L. R. 3; *R. v. Teale and others*, *cor.* Lawrence, J., at York. It is said to have been held, that the question, whether a witness for one party had not attempted to dissuade a witness for the adversary from attending to give evidence at the trial, was so immaterial, that if the witness answered in the negative he could not be contradicted; *Harris v. Tippet*, 2 Camp. 637, *cor.* Lawrence, J. It cannot, however, be doubted that the fact, if proved, would show a very strong and improper bias on the mind of the witness, and in a doubtful case afford a fair ground for suspecting his sincerity. In *Lord Stafford's case*, 7 Howell's St. Tr. 1400, the prisoner was allowed to prove that Dugdale, a witness for the prosecution, had endeavoured to suborn witnesses to give false

2 Bailey, 466; *Atwood v. Welton*, 7 Conn. 66; *United States v. Dickenson*, 2 McLean, 325; *Dozier v. Joyce*, 8 Porter, 303; *Ortez v. Jewett*, 23 Ala. 662; *Seavy v. Dearborn*, 19 N. Hamp., 351; *Cornelius v. The Commonwealth*, 15 B. Monroe, 539.

It is in the discretion of the court trying a case to say how far irrelevant questions may be asked of a witness on a cross-examination; *Clark v. Trinity Church*, 5 Watts & Serg. 266; *Gloucester v. Bridgham*, 28 Maine, 60; *Powers v. Leach*, 26 Verm. 270.

¹ A defendant having cross-examined a plaintiff's witness on subjects irrelevant to the issue, will not be permitted to give evidence that the witness testified falsely on those subjects; *Griffith v. Eshelman*, 4 Watts, 51; *Smith v. Dreer*, 3 Whart. 154; *Stevens v. Beach*, 12 Verm. 585; *The People v. Rector*, 19 Wend. 569; *McIntyre v. Young*, 6 Blackford, 496; *Wuu-kon-chaw-neck-kaw v. United States*, 1 Morris, 332; *Howard v. City Fire Ins. Co.*, 4 Denio, 502; *Herson v. Henderson*, 3 Foster, 498; *Morgan v. Frees*, 15 Barb. 352; *Ortez v. Jewett*, 23 Ala. 662.

The statements of a witness, made out of court, contrary to what he swears at the trial, concerning facts relevant to the issue, may be proved to impeach his credit; but not if they be of irrelevant facts; *Shields v. Cunningham*, 1 Blackford, 86.

issue was asked, on cross-examination, whether he had not said that the officer of the Crown had offered him a bribe to give that evidence. He denied having said so, and evidence being then tendered to prove that he had made such a statement, it was rejected.^m This rule does not of course exclude the contradiction of the witness as to any facts immediately connected with the subject of inquiry, which in themselves would otherwise be legitimate evidence in the cause.ⁿ A witness may, however, be asked whether, *203] in consequence of his *having been charged with robbing the prisoner, he has not said that he would be revenged

evidence against the prisoner. The late case of *Thomas v. David*, 7 C. & P. 350, E. C. L. R. 32, tends to overrule *Harris v. Tippet*. There, in an action on a promissory note, the plaintiff's servant (an attesting witness) being called to prove the signature, was asked on cross-examination, whether she did not sleep in the same bed with the plaintiff. On its being objected that the point of intended contradiction was merely collateral, Coleridge, J., in overruling the objection, said: "Is it not material to the issue whether the principal witness who comes to support the plaintiff's case was his kept mistress? If the question had been whether the witness had walked the streets as a common prostitute, I think that would have been collateral to the issue, and that, if the witness had denied such a charge, she could not have been contradicted; but here the question is, whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to support a forgery—just in the same way as if she had been asked, if she was the sister or daughter of the plaintiff." And where the question was, what consideration passed on discounting a bill of exchange, Lord Tenterden held, that what a witness had said upon a former trial between the parties concerning another bill discounted at the same time and under the same circumstances was not collateral; *Meagoe v. Simmons*, 3 C. & P. 76; E. C. L. R. 14. But, in an action on a policy of insurance, a witness for the defendant was asked, whether he had not said that "they had not a leg to stand upon." Tindal, C. J., held, that contradiction was inadmissible; *Elton v. Larkins*, 5 C. & P. 590; E. C. L. R. 24. Upon this principle, on a question as to the genuineness of handwriting, though the jury may compare the document with the authentic writings of the party to whom it is ascribed, provided such writings are in evidence for other purposes, *Doe dem. Perry v. Newlor*, 5 Ad. & E. 514, E. C. L. R. 31, witnesses cannot be asked whether papers, not in evidence in the cause, placed on the witness-box, were signed by the party with a view to test their knowledge of the handwriting by their agreement or disagreement; *Griffiths v. Ivery*, 11 Ad. & E. 322; E. C. L. R. 39. So where a witness, called to prove the handwriting of an attesting witness to a bond, swore that it was not his handwriting, and another paper was then shown him which he also stated was not in that person's handwriting, which latter paper was not in evidence in the cause, it was held that the plaintiff could not, for the purpose of contradicting the witness, prove that the latter paper was written by the attesting witness; *Hughes v. Rogers*, 8 M. & W. 123. See Vol. II., HANDWRITING.

^m *Attorney-General v. Hitchcock*, 1 Exch. 91.

ⁿ *Per Alderson, B., in Attorney-General v. Hitchcock*, 1 Exch. 91.

upon him: and, in case of denial, he may be contradicted.^o In such a case the inquiry is not collateral, but most important, in order to show the motives and temper of the witness in the particular transaction. But, in order to let in such a contradiction, the witness should have been cross-examined as to the use of such expressions in order to enable him to explain them; thus, in an action for seduction of the plaintiff's daughter, she was asked whether she knew *A. B.*, and she thereupon having denied that she knew him, evidence that she had told a witness that *A. B.* was the father of her child and had seduced her, offered by way of contradiction, was rejected. But the Court observed that had she been cross-examined as to statements made by her relating to him, such evidence would have been admissible.^p Of course witnesses cannot be called to contradict a witness as to a fact which he says he does not recollect, or to which he will not positively depose.^q

It is now settled by the authority of the legislature, that a witness cannot refuse to answer questions^r because *he may subject himself to a civil liability or charge; but he is not bound [*204 to answer any question, either in a court of law or of equity, if his

^o *Fewin's case*, 2 Camp. 638, n., *cor.* Lawrence, J.

^p *Carpenter v. Wall*, 11 Ad. & E. 303; E. C. L. R. 39.

^q *Long v. Hitchcock*, 9 C. & P. 619; E. C. L. R. 38.

^r Before the passing of the 46 Geo. III. c. 37, it was *vexata quæstio*, whether a witness was bound to answer when the answer might subject him to civil liabilities. On the question being proposed by the House of Lords to the Judges, Mansfield, C. J. of C. P., Grose and Rooke, Js., and Thompson, B., were of opinion that he was not; but the Lord Chancellor and the other Judges were of a contrary opinion. They were all of opinion that a promise to a witness that he should be excused from certain debts, provided he made a full and fair disclosure, did not render him incompetent on the score of interest; Cobbett's P. D. vol. 6, p. 167. But this statute declares and enacts, that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to expose him to a penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty or of any other person or persons.

Although this statute in its terms applies to oral evidence only, yet it has been held that a witness is not excused from producing papers merely because they may subject him to an action, or be prejudicial to his pecuniary interest; *Doe v. Date*, 3 Q. B. 609; E. C. L. R. 43; *Doe v. Earl of Egremont*, 2 M. & Rob. 386; otherwise, of course, if they are his muniments of title; *Ibid.*

A rated parishioner in a settlement case is a party to the appeal, and therefore does not come within the words or meaning of the Act; *R. v. Woburn*, 10 East, 395; see 54 Geo. III., c. 170.

answer will expose him to any criminal punishment or penal liability, or even tends collaterally to convict him, agreeably to the wise and humane principle that no man is bound to criminate himself.^{s1} *Accordingly, a witness is not compellable to say
*205] whether he published a particular paper, if the contents be

^s *R. v. Barber*, Stra. 444; *Cates v. Hardacre*, 3 Taunt. 424; *Sir J. Friend's case*, 13 How. St. Tr. 1; *Lord Macclesfield's case*, 16 How. St. Tr. 767; 16 Ves. jun. 242; *Title v. Grevel*, 2 Ld. Raym. 1008; *R. v. Oates*, 10 How. St. Tr. 1079; 2 Haw. c. 46; *Mitford's Ch. Pl.* 157; *R. v. Lord George Gordon*, 2 Doug. 593; *Hardy's case*, 24 How. St. Tr. 755; *R. v. Slaney*, 5 C. & P. 213; E. C. L. R. 24; *R. v. Pegler*, *ibid.* 521; *Maloney v. Bartley*, 3 Camp. 210; *Dandridge v. Corden*, 3 C. & P. 11; E. C. L. R. 14; *R. v. De Berenger and others*, reported by Gurney,

¹ As to the privilege of a witness to refuse an answer which may criminate or disgrace him, see *People v. Herrick*, 13 Johns. 82; *Grannis v. Brandon*, 5 Day, 260; *State v. Bailey*, 1 Pennington, 415; *Vaughn v. Paine*, 2 Ibid. 728; *United States v. Craig*, 4 Wash. C. C. 729; *Sodusky v. McGee*, 5 J. J. Marsh. 621; *Southard v. Rexford*, 6 Cow. 254; *Fries v. Brugler*, 7 Halst. 79; *People v. Mather*, 4 Wend. 229; *U. States v. Dickenson*, 2 McLean, 325; *Poole v. Perritt*, 1 Speers, 128; *Chamberlin v. Wilson*, 12 Verm. 491; *The People v. Rector*, 19 Wend. 569; *Robinson v. Neal*, 5 Monroe, 212; *Lister v. Boker*, 6 Blackf. 439; *Henry v. Salina Bank*, 1 Comst. 83; *Janvrin v. Scammon*, 9 Foster, 280.

But when his objection to answer is, that he may thereby be subjected to a penalty, and it appears to the court that the statute of limitation has barred the penal action or proceeding, he cannot insist on his privilege; *Close v. Olney*, 1 Denio, 319; *Bank of Salina v. Henry*, 2 Ibid. 155; S. C., 3 Denio, 593; *Weldon v. Burch*, 12 Illinois, 374.

If a witness, called to support a criminal prosecution, objects to give his testimony, because it will criminate himself, but is, nevertheless, erroneously compelled to testify, and the defendant is convicted, it seems that the error does not affect the rights of the witness alone, but that the defendant may object that the conviction was founded upon illegal evidence; *The Comm'th v. Kimball*, 24 Pick. 366.

The witness, with the instruction of the court when necessary, must decide whether his answer will tend to criminate him; and his decision is upon oath and at the peril of perjury; *The People v. Rector*, 19 Wend. 569; *Poole v. Perritt*, 1 Speers, 128.

Although a witness is his own judge as to whether his answer would criminate himself, he is nevertheless liable to an action by the party for a refusal to testify, if his refusal be wilful and his excuse false; *Warner v. Lucas*, 10 Ohio, 336.

A witness is bound to answer, though he may be thereby subjected to a pecuniary liability; *Bull v. Loveland*, 10 Pick. 9; *Hays v. Richardson*, 1 Gill & Johns. 366; *Comm'th v. Thurston*, 7 J. J. Marsh. 62; *Naylor v. Semmes*, 4 Gill & Johns. 273; *Copp v. Upham*, 3 N. Hamp. 159; *Devoll v. Brownell*, 5 Pick. 448; *Baird v. Cochran*, 4 Serg. & Rawle, 397; *Alexander v. Knox*, 7 Alabama, 503; *Judge of Probate v. Green*, 1 How. Miss. 146; *Zollicoffer v. Turner*, 6 Yerger, 297; *Lowney v. Perham*, 2 App. 235; *Conover v. Bell*, 6 Monroe, 157; *Stevens v. Whitcomb*, 16 Vermont, 121.

libellous;[†] and upon an appeal against an order of bastardy, he is not bound to declare whether he is the father of a bastard child.[‡] In an action against the acceptor of a bill of exchange, a witness is not bound to answer whether the bill was not given for differences on stock-jobbing transactions for time.[§] The prosecutrix on an indictment for a rape is not bound to answer whether she has had criminal intercourse with any other person.[¶] An accomplice, admitted to give evidence for the Crown, is not bound to disclose his share in other offences which are not the subject of inquiry, and for which he would be liable to prosecution.[‡] A witness is also protected from answering any question which would subject him to any penalty, or to forfeiture of his estate.[‡] In *Sir* [*206

195; *Cates v. Hardacre*, 3 Taunt. 424; 16 Ves. 242. In some instances it has been found necessary to protect witnesses from penalties to which their evidence has rendered them liable by an Act of Parliament; see 45 Geo. III., c. 126; 1 & 2 Geo. IV., c. 21. *Macallum v. Turton*, 2 Y. & J. 183. In strictness, however, it is no ground of legal objection by the party in the cause, that the answer to a proposed question may place the witness in jeopardy; it is peculiarly the objection of the witness himself, who is under the protection of the law, and is always apprised of his situation by the presiding Judge; *Parkhurst v. Lowten*, 2 Swanst. 216. The same rule applies if the husband or wife would be exposed in like manner; *Cartwright v. Green*, 8 Ves. 405; and whether the punishment would be imposed by a temporal, or ecclesiastical Court; *Brownsword v. Edwards*, 2 Ves. 245; *Chetwynd v. Lindon*, *ibid.* 450; *Finch v. Finch*, *ibid.* 493. Where a witness declined on cross-examination to state where he lived, as he believed that a bailable writ was out against him at the suit of the defendant, the court would not compel him to answer; *Watson v. Bevern*, 1 C. & P. 363; E. C. L. R. 12.

[†] *R. v. Barber*, Stra. 444; *Maloney v. Bartley*, 3 Camp. 210, where, in an action for a libel published in an affidavit sworn before a magistrate, it was held that the magistrate's clerk was not bound to state whether he wrote the affidavit and delivered it to the magistrate: a bill of exceptions was tendered, but not proceeded in. In an action for a libel on the plaintiff as hundred constable, purporting to be a memorial from the vestry of *P.*, the vestry-clerk being called to produce the vestry-books, it was held that he could not refuse on the ground that he might thereby criminate himself, the books being directed to be kept by 58 Geo. III., c. 69, s. 2; *Bradshaw v. Murphy*, 7 C. & P. 612; E. C. L. R. 32.

[‡] *R. v. St. Mary's, Nottingham*, 13 East, 57, n.

[§] *Thomas v. Tucker*, cor. Lord Tenterden, C. J., Sitt. aft. Easter, 1827.

[¶] *R. v. Hodgson*, 1 Russ. & Ry. C. C. 211; and see *Dodd v. Norris*, 3 Camp. 519. The answer here, however, might have subjected the witness to spiritual censure and punishment.

[‡] *West's case*, O. B. Sess. after Easter T. 1823.

[‡] The declaratory statute, 46 Geo. III., c. 37, imports that a witness is not bound to answer any question the answering of which tends to expose him to a penalty or forfeiture of any nature whatever. So in equity a party is not bound to answer

J. Friend's case,^b it was ruled, that the witness could not be asked whether he was a Roman Catholic, since he might thereby subject himself to penalties. And it has even been held, that a witness is protected from admitting his commission of an offence, although he has received a pardon;^c for the answer may place him in jeopardy, and he would have to set up the pardon in bar to the prosecution. But where a witness has been guilty of an infamous crime, and has been punished for it, he may, it is said, be asked whether he has not undergone the punishment, because his answer cannot subject him to further punishment.^d And where the questions might subject the witness to penalties, but the time for proceeding against him is passed, he is bound to answer.^e If the witness voluntarily answer questions improperly put, his answers may afterwards be used as evidence against him.^f Where a witness, after having been cautioned that he is not compelled to answer a question on the ground that his answers might subject him to an indictment, answers at all, it has been held that he is bound to disclose the whole of the transaction.^g If, however, the witness claims the protection of the court, and there appears reasonable ground to believe that his answer would criminate him, but notwithstanding he is obliged to answer, what he says must be considered as obtained by a species of duress, and cannot be used in

so as to subject himself to any punishment, pains, penalties, or forfeiture of interest; see Mitford's Ch. Pl. 157. But the full effect of the privilege is not allowed in bankruptcy; *Ex parte Cossens re Worrall*, Buck. 531.

^b 13 How. St. Tr. 1. But the statutes inflicting these penalties are now repealed.

^c *R. v. Reading*, 7 How. St. Tr. 259; *R. v. Earl of Shaftesbury*, 6 How. St. Tr. 1171; *S. C.*, M. & M. 193; E. C. L. R. 22; note; but see two next notes.

^d *R. v. Edwards*, 4 T. R. 440; but see note (k), *post*, p. 207.

^e *Roberts v. Allatt*, Mood. & M. 192; E. C. L. R. 22.

^f *Stockfleth v. De Tastet*, 4 Camp. 10; *Smith v. Beadnell*, 1 Camp. 30; *R. v. Mercer*, 2 Stark. C. 366; E. C. L. R. 3.

^g *Dixon v. Vale*, 1 C. & P. 278; E. C. L. R. 12; *East v. Chapman*, 2 C. & P. 570; E. C. L. R. 12. So in the case of a witness interrogated in equity; *Austin v. Prince*, 1 Sim. 348.

¹ If he voluntarily state a fact, he is bound to state how he knows it, although in so doing he may expose himself to a criminal charge; *State v. K—*, 4 N. Hamp. 562. If the witness understandingly waive his privilege, and begin to testify, he must submit to a full cross-examination, if required; *Chamberlin v. Willson*, 12 Verm. 491; *Amherst v. Hollis*, 9 N. Hamp. 107; *People v. Lohman*, 2 Barb. S. C. Rep. 216; *The State v. Foster*, 3 Foster, 348; *Coburn v. Odell*, 10 Foster, 540; *Foster v. Pierce*, 11 Cushing, 437.

evidence against him.^h And it makes no difference as to the right of the witness to protection, that he *had before answered in part. He may claim his privilege at any stage of the [*207 inquiry.ⁱ

The protection has been carried much further. It has been held, that a witness is not bound to answer any question which tends to render him infamous, or even to disgrace him, and that such evidence was inadmissible. In *Cook's case*,^k Treby, C. J., said, "*If it be an infamous thing, that is enough to preserve a man from being bound to answer;*" and he therefore held, that persons convicted and pardoned, or convicted and punished for crimes, could not be obliged to answer, since it was matter of reproach, and that it should not be put upon a man to answer a question, wherein he would be forced to forswear or disgrace himself.^l It is however to be observed, that the case of *The King v. Edwards*^m is inconsistent with the above *dictum*; since it was there held that a person proposed as bail was bound to answer the question whether he had stood in the pillory for perjury,

The question, whether a witness must answer questions which tend to disgrace him,ⁿ is, like many other difficult questions on the subject of evidence, one of policy and convenience. On the one hand, it is highly desirable that the jury should thoroughly understand the character of the persons on whose credit they are to decide upon the property and lives of others; and neither life nor property ought to be placed in competition with a doubtful and contingent injury to the feelings of individual witnesses. On the other hand, it may be said that it is hard that a *witness should be obliged upon oath to accuse himself of a crime, or [*208 even to disgrace himself in the eyes of the public; that it is a harsh alternative to compel a man to destroy his own character, or to commit perjury; that it is impolitic to expose a witness to so great a temptation; and that it must operate as a great discouragement

^h *Reg. v. Garbett*, 2 C. & K. 474; E. C. L. R. 61.

ⁱ *Reg. v. Garbett*, 2 C. & K. 474; E. C. L. R. 61.

^k 13 How. St. Tr. 311; 1 Salk. 153.

^l The question in that case was, whether a jurymen who had been challenged could be asked whether he had not before the trial asserted the guilt of the prisoner.

^m 4 T. R. 440. See *Rex v. Lewis and others*, 4 Esp. C. 225, where it is said to have been ruled, that a witness could not be asked whether he had been in the House of Correction; and *MacBride v. MacBride*, 4 Esp. 242, where it was held that a witness could not be asked questions which tended directly to disgrace him.

ⁿ See tit. RAPE—SEDUCTION.

to witnesses, to oblige them to give an account of the most secret transactions of their lives before a public tribunal. That a collateral fact tending merely to disgrace the witness, is not one which is properly relevant to the issue, since it could not be proved by any other witness; and that there would be, perhaps, some inconsistency in protecting a witness against any question, the answer to which would subject him to a pecuniary penalty, and yet to leave his character exposed.

In the first place, it is quite settled that a man is not bound to criminate himself, or to answer any question by which he may incur a penalty.^o It may be observed further, that the principle extends not only to questions where the answer would immediately criminate the witness, but to all questions which tend collaterally to his conviction, or to supply any link in proof of a charge against him.^o As to questions which tend *merely* to disgrace the witness, there is some difficulty.

In *Cook's case*,^p the prisoner, on an indictment for high treason, asked the jurors, in order to challenge them, whether they had not said that he was guilty, and would be hanged? and the question was overruled; and the court said, You shall not ask a witness or juryman whether he hath been whipped for larceny, or convicted of felony; or whether he was ever committed to Bridewell for a pilferer, or to Newgate for clipping and coining; or whether he is a villain or outlawed; because that would make a man discover that
 *209] of himself which tends to shame, *crime, infamy, or misdemeanor. In this case it is to be recollected that the object was to exclude the juryman entirely by raising an objection to his competency. The same observation applies also to *Laver's case*,^q where the court overruled the attempt of the prisoner to ask a witness on the *voir dire*, whether he had been promised a pardon, or some reward for swearing against the prisoner; and in that case L. C. J. Pratt said, If the objection goes to his credit, must he not be sworn, and his credit left to the jury? No person is to discredit himself, but is always taken to be innocent till it appear otherwise.

^o See, as to these two propositions, *ante*, p. 204, note (s), where the authorities are collected.

^p 1 Salk. 153; 13 How. St. Tr. 311; and see the observations of Treby, J., above.

^q 16 How. St. Tr. 101. The Chief J. (Pratt) did not deny that the question might be put after the witness had been sworn. The cases of a witness and juror differ very materially. With respect to jurors, no question is properly allowable, except for the purpose of showing total incompetency.

The question, whether a witness was bound to answer a question upon a collateral fact tending to disgrace him, did not arise in any of the foregoing cases,^r and therefore the *dicta* thrown out by the court were, in some measure, extra-judicial, as far as regards the present question. In the case of *R. v. Lewis*,^s which was an indictment for an assault, a witness, who is stated in the report of the case to have been a common informer, and a man of suspicious character, was asked, upon cross-examination, if he had been in the house of correction in Sussex? And Lord Ellenborough is stated to have interposed, and to have said, that the question should not be asked, since it had formerly been settled by the judges, among whom were C. J. Treby and Mr. J. Powell, both very great lawyers, that a witness was not bound to answer any question the object of which *was to degrade or render him infamous. It is to be observed, however, that his Lordship did not [210 afterwards strictly adhere to this rule.^t In the case of *Macbride v. Macbride*,^u a witness for the plaintiff, in an action for assumpsit, was questioned as to her cohabiting with the plaintiff; Lord Alvanley interposed, and excluded the question; but his Lordship added, "I do not go so far as others may; I will not say that a witness shall not be asked to what may tend to disparage him; that would prevent an investigation into the character of the witness, which it may be of importance to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disparage." Upon the trial of *O'Coigly* and *O'Connor*,^v the witness having, upon a question being put which threw an imputation on him, appealed to the court for protection in the first instance, the court would not permit the question to be repeated. In the case of

^r There are many instances in which a man may be a witness who cannot be a juror; 2 Hale, 278, 11 H. 4. One attainted and pardoned cannot be a juror; *per* Holt, C. J., *Rookwood's case*, 4 St. Tr. 642; but he may be a witness. The reason is, that a juror cannot be examined and sifted as to the grounds of his verdict, as a witness may as to his testimony. The ancient rule of law was otherwise.

^s 4 Esp. C. 225.

^t At the sittings of Westminster after Hil. Term, 1818, a witness was compelled by his Lordship to answer the question whether he had not been confined in a particular gaol; *infra*, p. 212, note (z).

^u 4 Esp. C. 242; but see *supra*, p. 201.

^v Upon the trial of *O'Coigly* and *O'Connor*, 24 How. St. Tr. 1353, the witness having, upon a question being put which threw an imputation on him, appealed to the court for protection in the first instance, the court would not permit the question to be repeated.

Harris v. Tippett,^{*} the witness was asked in cross-examination, whether he had not attempted to dissuade a witness for the plaintiff from attending the trial; he swore that he had not; and on its being proposed to bring evidence to contradict the witness on this point, Mr. J. Lawrence would not allow it, the fact being collateral to the issue; but he added, "I will permit questions to be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of trying his credit; but when those questions are irrelevant to the issue upon *record, you cannot
*211] call other witnesses to contradict the answers he gives."

And in *Yewin's case*^x the same learned judge allowed the prisoner's counsel to ask a witness in cross-examination, whether he had not been charged with robbing his master. Where a man's liberty, or even life, depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to be trusted; they cannot look into his breast and see what passes there, but must form their opinion on collateral indications of his good faith and sincerity. Whatever, therefore, may materially assist them in their inquiry, is most essential to the investigation of truth; and it cannot but be material for the jury to understand the character of the witness whom they are called to believe; and to know whether, although he has not been actually convicted of any crime, he has not in some measure rendered himself less credible by his disgraceful conduct. In the case of *The King v. Edwards*,^y on an application to bail the prisoner, who was charged with felony, one of the bail was asked, whether he had not stood in the pillory for perjury? and upon objection being made that it tended to criminate the party, the court held that there was no impropriety in the question, since his answer could not subject him to any punishment.

The great question, therefore, whether a witness is *bound* to answer a question to his own disgrace, has not yet undergone any direct and solemn decision, and appears to be still open for consideration. The truth or falsehood of testimony frequently cannot be ascertained by mere analysis of the evidence itself; the investigation requires collateral and extrinsic aids, the principal of which consists in a knowledge of the source or depository from

^{*} 2 Camp. 637, cited in *R. v. Watson*, 2 Stark. C. 116; E. C. L. R. 3; but see *supra*, p. 201.

^x 2 Camp. 638, n.

^y 4 T. R. 440.

which such testimony is derived: the whole question resolves itself into one of policy and convenience, that is, whether it *would be a greater evil that an important test of truth [*212 should be sacrificed, or that by subjecting witnesses to the operation of this test, their feelings should be wounded, and their attendance for the purposes of justice discouraged? The latter point seems to deserve the more serious consideration, since the mere offence to the private feelings of a witness who has misconducted himself cannot well be put in competition with the mischief which might otherwise result to the liberties and lives of others. No great injustice is done to any individual upon whose oath the property or personal security of others is to depend, in exhibiting him to the jury such as he is. As to the other consideration, it does not seem to be very clear that by permitting such examinations any serious evil would result; the law possesses ample means for compelling the attendance of witnesses, however unwilling they may be. The evil on this side of the question is at all events doubtful and contingent; on the other side it is plain and certain.

The principle on which such evidence is admissible is clear and obvious; the reason for excluding it is extrinsic and artificial, and, it may be added, but theoretical; for courts are in the constant habit of permitting such questions to be put,^{*} and answers to be given and received as evidence for the consideration of the jury.

^{*} In the case of *Frost v. Holloway*, K. B. sitt. after Hil. Term, 1818, Lord Ellenborough, C. J., compelled a witness to answer whether he had not been confined for theft in gaol; and, on the witness's appealing to the Court, said, "If you do not answer I will send you there;" *Ex relatione Gurney*. In the case of *Cundell v. Pratt*, Moo. & M. 108; E. C. L. R. 22; the witness was asked, on cross-examination, whether she was not cohabiting in a state of incest with a particular individual; Best, C. J., interfered to prohibit the question; it was urged by Spankie, Serj., that he had a right to put questions tending to degrade a witness, for the purpose of trying his character; but Best, C. J., said: "I do not forbid the question on that ground; I for one will never go that length. Until I am told by the House of Lords I am wrong, the rule I shall always act upon is, to protect witnesses from questions, the answers to which may expose them to punishment. If they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer. This question may subject her to punishment; I think, therefore, it ought not to be put." In point of practice, such questions are every day put and answers exacted. And now, when infamy forms no objection to a witness's competency, and therefore a party would not be allowed to adduce evidence upon the point (*Harris v. Tippet*, 2 Camp. 637,) it seems to be essential to the ends of justice that the witness should be compelled to answer such questions.

*213] *The decision of this question is of less practical importance than might have been expected, since, whether a witness be or be not bound to answer such questions as tend to his disgrace, it seems to be allowed that the questions may be put ;^a and it is obviously of little consequence whether the witness admits that which is insinuated against him, or refuses to answer the question ; for though in strictness no inference ought to be made as to the truth of the fact where the witness has refused to answer,^b yet the refusal must make an unfavourable impression upon the jury, since an honest man would naturally be eager to deny the fact and rescue his character from suspicion, and would not refuse to answer merely because he had a strict legal right to refuse.^c

Where the question is so connected with the point in issue that the witness may be contradicted by other evidence if he deny the fact, the law itself requires that the question should be put to the witness, in order to afford him an opportunity for explanation, although the answer may involve him in consequences highly penal.^d It was held by all the judges, not only that a question, as *214] *to an act done by the witness, the answer to which might criminate him, might be put, in order to afford a foundation for contradicting him if he denied the fact, but even that the adverse party could not, without asking the question, adduce such evidence to impeach the credit of the witness.^e

The privilege of refusing to answer is that of the witness, and not of the party ; and Lord Tenterden refused to allow the question to be argued by the counsel of the party who called the witness.^f

^a *Harris v. Tippet*, 2 Camp. 638 ; *Lord Cockrane's trial*, by Gurney, p. 419 ; *Hardy's case*, 24 Howell's St. Tr. 726 ; *R. v. Jewin*, 2 Camp. 638, n. ; *R. v. Watson*, 2 Stark. C. 116 ; E. C. L. R. 3.

^b *Rose v. Blakeman*, Ry. & M. 383 ; E. C. L. R. 21 ; see Lord Ellenborough's remarks in *Milman v. Tucker*, 2 Peake, N. P. C. 222.

^c See the observations of the Judges in *R. v. Watson*, 2 Stark. C. 116 ; E. C. L. R. 3.

^d *The Queen's case*, 2 B. & B. 311 ; E. C. L. R. 6.

^e *The Queen's case*, 2 B. & B. 311 ; E. C. L. R. 6. Thus in an action against *A.* for seducing plaintiff's daughter, which fact the daughter proved, it was held the defendant could not give evidence that she had talked of *B.* as her seducer and the father of her child, unless she had been first asked in cross-examination, whether she had ever said so ; *Carpenter v. Wall*, 11 Ad. & E. 803 ; E. C. L. R. 39.

^f By Lord Tenterden, in *Thomas v. Newton*, Moo. & M. 48, n. ; E. C. L. R. 22 ; *R. v. Adey*, 1 M. & Rob. 94 ; and it seems doubtful whether the court can review the decision of a judge, when he has compelled the witness to answer or produce the document ; see *Marston v. Downes*, 1 Ad. & E. 34 ; E. C. L. R. 28 ; *Doe v. Date*, 3 Q. B. 609 ; E. C. L. R. 43.

It was formerly thought that if a witness voluntarily answered questions tending to criminate him on his examination in chief, he was bound to answer, on cross-examination, however penal the consequence might be, and if he answered the question in part, he was bound to disclose the whole truth;^s but on consideration by the whole of the judges, it has been held by a majority that a witness after having answered some questions may stop at any moment and claim his privilege, and that if the judge nevertheless force him to proceed, what he says cannot be made use of against him in a criminal proceeding.^b If, however, the witness voluntarily choose to answer a question to which he might have demurred, his answer may afterwards be used in evidence against him for all purposes.ⁱ

*If a witness give an answer to a question put for the purpose of degrading his character, the party will be bound by his answer, and cannot adduce evidence in contradiction.^j This is but a particular application of the general rule applicable in all cases of inquiry as to mere collateral facts. [*215]

If by an unfortunate or unskilful question put on cross-examination a fact be extracted which would not have been evidence upon an examination in chief, it then becomes evidence against the party so cross-examining.^k *But a witness is not allowed voluntarily to obtrude inadmissible evidence, and if he do, it is [*216]

^s *Per* Dampier, J., Winchester Sum. Ass. 1815, Mann. Index, Witness, 222; *East v. Chapman*, Moo. & M. 47; E. C. L. R. 22.

^b *Reg. v. Garbett*, 2 Car. & K. 474; E. C. L. R. 61.

ⁱ *Smith v. Beadnell*, 1 Camp. 30; *Stockfleth v. De Tastet*, 4 Camp 10.

^j Lord Ellenborough, in *Watson's case*, Gurney's Rep., vol. ii., 288, observed, "Whether he has been guilty of such a crime is improperly asking him in a degree, because you are calling upon him, upon the sanction of his oath, to answer that which he is not bound to answer, for no man is bound to criminate himself; but if, from a desire to exculpate himself from the imputation of a crime, he gives an answer, it has been held by many of our judges, and I never knew it ruled to the contrary, that having put such question he must be bound by the answer. The court is not a court to try a collateral question of crime, and it would be unjust if it were; for how can the party be prepared with a case of exculpation, or with an answer to any evidence which may be adduced to charge him? There is no possibility of a fair and competent trial on that subject, and therefore in no instance is it done."

^k *Wright dem. Clymer v. Littler*, Burr. 1244; 1 Bla. 346. The lessor of the plaintiff claimed under a will dated in 1743. The defendant relied on a will bearing date 1745. The plaintiff, in answer, called *Mary Victor*, the sister of *William Medlicott*, deceased, whose name appeared as an attesting witness to the will of 1745, to prove that her brother, in his last illness, and three weeks before his

not to be considered as evidence in the cause.¹ This is a just and most important rule; a fraudulent and subtle witness will sometimes endeavour to baffle his cross-examiner, and deter him from pursuing his course by introducing into his answers matters foreign to the question, but unfavourable to the cross-examining party.

Where a witness is cross-examined as to writings, the examination is conducted with a view either to establish in evidence the contents of a written document as material to the cause, or to test the memory or the credit of the witness. In the former view, the subject of cross-examination has been the object of much consideration by the judges.

In the course of the proceedings in the House of Lords in *The Queen's case*, Louisa Dumont, a witness in support of the charge, having been asked, upon cross-examination, whether she did not use certain expressions which the counsel read from a supposed letter from the witness to her sister, it was objected by the Attorney-General that the letter itself ought to be put in before any use could be made of its contents.

The following questions were in consequence proposed to the judges:^m

First. Whether in the courts below a party, on cross-examination, would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote the letter, and his admitting that he wrote such letter? ●

death, pulled out of his bosom the will of 1743, and said it was the true will of *J. C.* Upon cross-examination by the counsel for the defendants, the witness further stated that her brother, when he produced the will of 1743, acknowledged and declared that the will of 1745 was forged by himself. After a verdict for the plaintiff, upon a motion for a new trial, upon the ground, *inter alia*, that the declaration by *Medlicott* of his having forged the will of 1745 ought not to have been left to the jury, it was answered by the court that the fact came out upon the defendant's own cross-examination, and he made no objection to it at the trial. See the observations on this case in *Stobart v. Dryden*, 1 M. & W. 624, 625. It would thence appear that the statement in the text is by no means clear.

¹ *Blewett v. Tregonning*, 3 Ad. & E. 554; E. C. L. R. 30. Consequently, if any dispute arise as to such inadmissible evidence, the witness will not be recalled to settle it; *Cattlin v. Barker*, 5 C. B. 201; E. C. L. R. 57.

^m *The Queen's case*, 2 B. & B. 286; E. C. L. R. 6.

Secondly, Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, [*217 upon showing a witness only a part of or one or more lines of such letter, and not the whole of it, whether he wrote such part, or such one or more lines; and in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?

The first question was answered in the negative for the following reasons:—"The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself and by that alone, if the paper be in existence. The proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness? If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and when the letter is produced then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining counsel may put the court in possession only of a part of the contents of the written paper; and thus the court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part."

To the second question the judges returned the following answer:—"In answer to the first part, 'Whether when a letter is produced in the courts below the court would allow a witness to be asked, upon showing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part?' the judges are of opinion that that question should be answered by them in the affirmative in that form; but in answer to the latter part, which is this, 'And in case the *witness shall not admit that he did or did not write such part, whether he can be exam- [*218 ined as to the contents of such letter?' the learned judges answer in the negative, for the reason already given, namely, that the paper itself is to be produced in order that the whole may be seen, and the one part explained by the other."

Upon the further question proposed, "Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote

that letter, the witness can be examined in the courts below, whether he did or did not make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are not contained in the letter?" The judges were of opinion, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter, but that the letter itself must be read to manifest whether such statements are or are not contained in that letter. They found their opinion upon what, in their opinion, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by any parol evidence.

To another question, viz.: "In what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the court below to be read," the learned judges answered, that according to the ordinary rule of proceedings in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; that that is the ordinary course; but that, if the counsel who is cross-examining, suggests to the court that he wishes to have the letter
 *219] read immediately, in order that *he may after the contents of that letter shall have been made known to the court, found certain questions upon the contents of that letter, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below; and for the convenient administration of justice the letter is permitted to be read at the suggestion of the counsel; but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence.

In the course of the same proceeding, the counsel for the Queen, having cross-examined *Guisepppe Sacchi*, whether he had ever represented to any person after he had left the service of the princess, that he had taxed himself with ingratitude towards a generous mistress; it was objected, that the witness should be asked whether such representation made by him was an oral or written one, because, if written, the writing itself should be produced before the question could be put. The following question was in conse-

quence proposed to the judges: "Whether, according to the established practice in the courts below, counsel, in cross-examining, are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?"

The Lord Chief Justice, in delivering the opinions of the judges, observed, that they felt some difficulty in giving a distinct answer to that proposition, as they did not remember an instance of a question having been asked by the cross-examining counsel, precisely in those words, and were not aware of any established practice distinctly referring to such a question. He adverted to the rule of law respecting the examination of a witness as to a contract or agreement, in which case, if the counsel on one side were to put a question generally as to the contract, the ordinary course is for the counsel on the other side to *interpose an immediate question, whether the contract referred to was in writing, [*220 and if the contract should appear to have been in writing, then all further inquiry would be stopped, because the writing itself must be produced. With *reference to this established rule*, they considered the question proposed to them, and were of opinion that the witness could not properly be asked on cross-examination, whether he had written such a thing, the proper course being to put the writing into his hands, and ask him whether it be his writing. They held, also, that if the witness were asked whether he had *represented* such a thing, they should direct the counsel to ask whether the representation had been made in writing or by words; and if in consequence he should ask whether it had been made in writing, the counsel on the other side would object to the question; but if he should ask whether the witness had *said* such a thing, the counsel would undoubtedly have a right to put that question.

It seems to be perfectly clear, that if it appear from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been destroyed, the objection founded on the reasons alleged by the learned judges ceases; and as the defendant may at all events, in his turn, adduce secondary evidence of the contents, there is no objection to his proving the contents in the first instance by means of the adversary's witness. Thus it has been held, where depositions have been taken and lost, a witness, after proof of the loss, may be cross-examined from copies.^a And

^a *R. v. Shellard*, 9 C. & P. 277; E. C. L. R. 38. So he may be cross-examined

in order to let in this secondary evidence, the cross-examining party, before or during the cross-examination, may call a person on his *subpoena duces tecum* to produce the writing,^o or *call on *221] the adversary so to do, if he has had no notice to produce.^p

It is to be observed, that the opinions delivered by the judges upon the preceding questions, were founded, for the most part, on the principle that the best evidence must be adduced which the case admits of, and on the supposition that the object of the cross-examination is to establish in evidence the contents of a written document as material to the cause. Where that is the case the objection is invincible.

But it frequently happens that the cross-examination of a witness as to what he has before said or written on the subject of inquiry, is material only as a test to try his memory and his credit.

Such evidence is usually admissible for no other purpose than to try the credit or capacity of the witness. What a witness stated on a former occasion may be very material evidence to contradict him, or impeach his testimony, but can rarely be evidence of the fact stated; and it is a remarkable circumstance, that the question was never, in the course of inquiry in the case which occasioned so much discussion on the subject, directly raised, whether a cross-examination as to something written by the witness, for the purpose, not of proving any fact in the cause, but simply of trying the credit or ability of the witness, was subject to the same strict rules as governed examination for proving material facts, and whether the witness might not be cross-examined as to what he had written, without producing the writing, where, although not proved to be lost, it was not in the possession of the examining party. It is also observable that the answers are founded mainly, if not wholly, on the supposition that the writing to which the question relates is in the possession of the examining party.

As the decisions of the judges have, according to opinions entitled to consideration, left the question, whether a witness may not be cross-examined as to the contents of a *written document, *222] for the purpose of impeaching his credit, without producing the document, still open, it may not perhaps be deemed presumptuous to offer a very few remarks upon this subject.

upon an office-copy of an affidavit used on moving for a new trial, which on a summons has been admitted to be a true copy; *Davies v. Davies*, 9 C. & P. 252 E. C. L. R. 38; *Attorney-General v. Bond*, 9 C. & P. 189; E. C. L. R. 38.

^o *Attorney-General v. Bond*, 9 C. & P. 189; E. C. L. R. 38.

^p *Calvert v. Flower*, 7 C. & P. 386; E. C. L. R. 32.

Upon every question of this nature two considerations arise: in the first place, whether the practice be advantageous and desirable with reference to some particular object; and if so, still whether, on the other hand, it may not be politic to exclude it, in order to avoid some inconvenience which would result from its reception greater than that which would accrue from its rejection.

That the permitting such a cross-examination may frequently supply a desirable test for trying the memory and the credit of the witness, admits of little doubt. If, for example, a witness profess to give a minute and detailed account of a transaction long past, such as the particulars of a conversation, or the contents of a written document, and consequently where much depends upon the strength of his memory, it is most desirable to put that memory to the test by every fair and competent means. His inability under those circumstances to state whether he afterwards committed the details of the transaction to writing, or if he admitted that he did so, his inability to state whether he then gave the same or a different account, or his admission that he gave a different account, without being able to explain why he did so, must necessarily operate to a greater or less extent to show the imperfection of his memory.

If a witness be called to prove the contents of a document written by another, which, it may be, he has seen but once, and that at a distant time, must it not be of the highest importance to ascertain whether his powers of memory are sufficiently strong to enable him to swear to the contents of a document written by himself at a later period relating to the same subject-matter? If he either deny that he has made any representation on the subject, or be unable to recollect what statement he has made, *the circumstance tends to impeach the faithfulness of his memory, even to a [*223 greater extent than if the representation had been merely oral, inasmuch as the act of writing is more deliberate, and more likely to remain impressed on the memory, than a mere oral communication; and the contradiction which the witness receives from the writing itself is also more important and more complete than that which results from the testimony of another, whose memory may be as liable to imperfection as that of the witness.

A cross-examination of this nature affords no mean test for trying the integrity of the witness. An insincere witness, who is not aware that his adversary has it in his power to contradict him, will frequently deny having made declarations and used expressions

which he is, on cross-examination, ultimately forced to avow; and it often happens, that by his palpable and disingenuous attempts to conceal the truth, he betrays his real character; and thus his denials, his manner and conduct, become of far greater importance, and much more strongly impeach his credit, than the answer itself does which he is at last reluctantly constrained to give.

Where the party is confined to the mere production and reading of the paper, without previous cross-examination, all inferences of this nature are obviously excluded, and the opportunity of contradicting him by the production of the document in opposition to his statement on oath, cannot occur.

These observations apply even although the writing containing the contradiction be in the possession of the party who cross-examines; but it may frequently happen that the document may have been lost, but that proof of the loss, and of the contents of the document, are in the power of the party cross-examining. In such a case, if the rule were strictly adhered to, a dilemma would occur, the effect of which might be to exclude the contradicting *224] evidence. The adverse party would not be able to go *into evidence of the contradictory document before he had, upon cross-examination, given an opportunity of explanation to the witness, and he could not, according to the rule, examine as to the contents of the writing before he had proved the contents. At all events he would labour under a difficulty in securing the attendance of an adverse witness until such time as he had established the necessary proof.^a

^a It has been suggested, that for the purpose of warranting the cross-examination of a witness as to the contents of a writing which has in fact been destroyed, or is in the hands of the other party, it is fit that the party proposing to cross-examine should be allowed to interpose evidence out of his turn to prove the fact of destruction or its being in such hands; or, that if any inconvenience should result from pursuing this course, the court should, in the exercise of its discretion, either admit the witness's statement in the first instance, or defer the cross-examination until the adversary shall have entered on his case. With respect to the second alternative, it may be observed, that to allow a party to enter upon secondary evidence, as it were *de bene esse*, and subject to be established or defeated by the subsequent proof or failure of proof, would be going farther than any existing precedent seems to warrant, and the party might reasonably object to admitting secondary evidence, which may in the result turn out to have been wholly inadmissible, nay, which perhaps his opponent might render inadmissible, if it served his purpose, by afterwards omitting to support it by legal evidence. Although, in *Graham v. Dyster*, 2 Stark. C. 21, E. C. L. R. 3, *Sideways v. Dyson*, *ibid.* 49, Lord Ellenborough ruled, that a defendant, having given the plaintiff notice to

*Such a cross-examination would also frequently afford a test of credit where the writing could not be produced, or its loss proved; for if the witness has in fact made statements in writing which, if produced, would impeach his credit, and either out of regard to his oath, or for fear of consequences, is induced to admit the fact, his answer, subject to the explanation which he may be able to give, must produce the same effect. [*225

The objections on the score of policy are, on the contrary, of a limited nature, it being admitted on all hands that the answers given cannot be received as any evidence of the writing itself for the purposes of the cause. It is possible that the witness having written what was true, may not recollect what he had written, or, to go to the greatest extent, may, even mistakingly, and from defect of memory, admit (even contrary to the truth) that he has given a description of the transaction inconsistent with his present testimony; but even this would operate as a test to try his memory, and the result would show that his recollection was imperfect: a consideration of the highest importance where the witness is called to detail conversations or the contents of a written document; a task to which few memories are adequate under ordinary circumstances.

And instances may be cited where evidence is admitted for one purpose and object to which it is applicable, although with refer-

produce writings in his possession, cannot cross-examine the plaintiff's witnesses as to their contents; yet, in the latter case, he observed, that though in strictness the evidence could not be anticipated, it was rigorous to insist upon the rule, and a close adherence to it might be productive of inconvenience. And, in *Calvert, Administrator, v. Flower*, 7 C. & P. 386, E. C. L. R. 32, the defendant, in the course of cross-examining the plaintiff's witness, called for the intestate's ledger under a notice to produce, Lord Denman, C. J., said, that if it was not produced, the defendant's counsel might cross-examine as to its contents. In *Attorney-General v. Bond*, 9 C. & P. 189, E. C. L. R. 38, the defendant's counsel, in order to cross-examine a witness for the Crown, called a witness on his *subpœna* to produce an affidavit. And, in *Reg. v. Shellard*, 9 C. & P. 277, E. C. L. R. 38, in order to cross-examine a witness for the prosecution as to what he said before the magistrates, the defendant called the officer of the court to prove that the depositions had been mislaid, and the magistrate's clerk to show that they had been taken, and to prove a copy. In the two latter cases it is obvious that it is essential for the simple purpose of cross-examining the witness; and then it would appear that it may undoubtedly be done, the evidence interposed being evidence for the court and not for the jury; but where, as in the two first cases cited above, the object is to establish independent proof, it may be questioned whether the proper course is not to postpone the cross-examination on this point, or to force the party to call the witness as his own.

ence to other purposes and objects to which the evidence relates *226] it is inadmissible and wholly *inoperative. Thus, in the ordinary case where a witness is cross-examined as to oral declarations made by him and connected with the cause, evidence is constantly offered to prove those declarations, where he denies them, not with a view to prove the truth of a declaration, but in order to impeach his credit. If, for instance, in an action for goods sold and delivered, a witness called to prove the delivery of the goods were to deny that he said to *A. B.* that the defendant in fact never had the goods, it would be competent to the defendant to call *A. B.* to prove that the witness did in fact make that declaration, not with a view to affect the plaintiff by making the declaration evidence of non-delivery (for it is no evidence of the fact,) but to impeach the credit of the witness.

Here the question is allowed for the purpose of impeaching the testimony of the witness, although it involves a fact of which the answer would be no evidence. If so, then, if the very same statement were in writing, why might not the question also be allowable for the very same limited purpose, that is, to impeach the witness's credit, although to establish the truth of the written statement, viz., that the goods had not been delivered, it would afford no evidence whatsoever.

Again, upon the ordinary examination of a witness on the *voir dire*, with a view to show that he is wholly incompetent, he might have been examined as to the contents of a written document not produced; and the reason is, that it is not probable that the writing which created his incompetency would be in possession or within the knowledge of the adversary: a reason which would frequently apply in full force in the present instance.*

*227] *To the objection that to allow such a cross-examination would be to deviate from the rule that the best evidence ought to be adduced that the case admits of, it may be answered that the principle of the rule is applicable only to evidence offered to prove a material fact, and is inapplicable where the object is

* It is true, that if the witness, upon examination on the *voir dire*, has the instrument with him, it must be produced; for the reason for dispensing with its actual production, viz., the difficulty of procuring it, has ceased; *Butler v. Carver*, 2 Stark. C. 433; E. C. L. R. 3. But where a witness is cross-examined in relation to a writing to try his credit, the reasons for permitting such cross-examination do not cease, although the party cross-examining be in possession of that instrument.

merely to try the credit or ability of the witness. The objection that otherwise only part of a document might be proved, seems to admit of the same answer. Besides, if the witness did recollect what he had written, he would be entitled to state the whole, or at least so much as was material; and if he denied having written to the effect stated, he could not be contradicted without producing the document and reading the whole.

It has, however, very recently been held by the Court of Common Pleas, that a witness cannot on cross-examination be asked whether he did not write an answer to a letter which charged him with an offence, unless that letter is produced or its absence satisfactorily accounted for, although the sole object be to discredit the witness.^f In an earlier case, also, the Court of Queen's Bench has said that a party has no right to cross-examine a witness on the contents of an affidavit made by him, without putting the original, or an examined or admitted copy of it, into his hands;^g and, of course, where an affidavit is produced with a view to cross-examine the witness who made it, and it appears to be the joint affidavit of the witness and another, and to relate to other persons besides the party adducing it, he can use so much of it only as relates to himself and was made by the witness.^{gk} [*228

A party having produced a document in cross-examination, is not bound to read it before he comes to his own case, although he has shown it to the witness and cross-examined him upon it;^h and if a party on cross-examination obtains proof of a document, the adversary, it has been said, has no right to see the paper for the purpose of re-examining the witness as to the paper being in the handwriting of the party whose handwriting is sworn to.ⁱ If the

^f *Macdonnell v. Evans*, 21 L. J., C. P. 141.

^g *Bastard v. Smith*, 10 Ad. & E. 213, E. C. L. R. 37, in which case the original was produced, and the expense of carrying it down was allowed by the court, on the ground, it would seem, that Tindal, C. J., had held that the original must be produced. But in *Highfield v. Peake*, M. & M. 109, E. C. L. R. 22, which was an issue out of Chancery, an examined office-copy, and in *Davies v. Davies*, 9 Car. & P. 252, E. C. L. R. 38, an office copy, admitted to be a copy under a judge's order, of an affidavit made by a witness in the cause, were allowed to be used for the purpose of cross-examination and contradiction. So an examined copy of an answer of the witness in Chancery was allowed to be used in *Ewer v. Ambrose*, 4 B. & C. 25; E. C. L. R. 10.

^{gk} *Attorney-General v. Bond*, 9 C. & P. 189; E. C. L. R. 38.

^h *Holland v. Reeves*, 7 C. & P. 36, E. C. L. R. 32, *cor.* Alderson, B.

ⁱ By Bosanquet, J., in *Russell v. Rider*, 6 C. & P. 416; E. C. L. R. 25. But it is extremely difficult to understand upon what ground this can be sustained, and

cross-examining counsel merely produce a paper and ask the witness whether it is in his handwriting, that does not entitle the other side to see it, but if he proceed to found any question on the document, the opposite counsel has a right to see it;^j and if, upon a writing being put into the witness's hand for the purpose of cross-examination, the cross-examination wholly fails, the adverse counsel is not entitled to look at the paper.^k And it has been held, that where a witness has been examined as to entries in a book, the adversary cannot cross-examine as to other entries which have not been used, without putting them in as his evidence.^l

With respect to the cross-examination of witnesses in criminal cases, as to matters occurring before the magistrates, the following rules of practice have been laid down by the judges^m since the passing of the Prisoners' Counsel Bill:—

1. That where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not in his deposition make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein, and that such deposition must be read as part of the evidence of the cross-examining counsel.

2. That after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition, after which the counsel for the prosecution may re-examine the witness, and, after

Holland v. Reeves, 7 C. & P. 36, E. C. L. R. 32, is opposed to it. In *Collier v. Nokes*, 2 Car. & K. 1012, E. C. L. R. 61, it was said that Parke, B., had ruled in the same way as Bosanquet, J.; and Wilde, C. J., in deference to that opinion, acquiesced in the same course, but expressed his own opinion that the opposite counsel had the right to see the document. If the proof failed, he certainly would have no right to see the paper, and perhaps it was confounded with that case.

^j *Cope v. Thames Haven Dock Company*, 2 C. & K. 757; E. C. L. R. 61.

^k *R. v. Duncombe*, 8 C. & P. 369; E. C. L. R. 34.

^l By Gurney, B., *Gregory v. Tavernon*, 6 C. & P. 280; E. C. L. R. 25. But, *semble*, he might use them to refresh the memory of the witness; a writing may (as has been seen) be used for this purpose without making it evidence.

^m These rules have been laid down by the judges for the regulation of counsel, but it is discretionary with the judge whether he will put questions to the witness as to any discrepancy between the statement of the witness on the trial and that contained in his depositions, without having it first read; *Rex v. Edwards*, 8 C. & P. 26; E. C. L. R. 34.

the prisoner's counsel has addressed the jury, will be entitled to the reply, and in case the counsel for the prisoner comments upon any supposed variance or contradiction without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

3. That the witness cannot in cross-examination be compelled to answer whether he did or did not make such a *statement before the magistrate until after his deposition has been [*230 read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination, and if the witness admits such a statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he had made such statement. But in either event the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

The witness therefore cannot, on cross-examination, be asked any question as to his statement before the magistrates without putting in his deposition; and indeed, in cross-examining a witness as to any other statement he may have made, it has been ruled that the questions put to him should expressly exclude the occasion of his examination before the magistrates or coroner.^a If however, from any accident, the deposition of the witness has not been duly taken or returned, this rule of course ceases to apply: but the mere circumstance of the magistrate having omitted to set forth the cross-examination before *him will not ex- [*231

^a *Per Patteson, J.*, in *Rex v. Holden*, 8 C. & P. 609; E. C. L. R. 34; and *Rex v. Shellard*, 9 C. & P. 280; E. C. L. R. 38; but Rolfe, B., has dissented from this ruling; *Harris's case*, Liv. Sum. Ass. 1845, Roscoe's Crim. Ev. 3rd ed. 237.

^o *Rex v. Griffiths*, 9 C. & P. 746; E. C. L. R. 38. And where minutes of the examination of the witnesses before the magistrates were made, and then a clerk by himself proceeded to put them in form, and in doing so put questions to the witnesses, the answers to which he embodied in the depositions, it was held by the Court of Criminal Appeal that a witness might be asked whether he did not make a particular statement to the clerk, without putting in his deposition, though that statement was inserted in his deposition, which was afterwards read over to him, after he had been re-sworn, in the presence of the magistrate and the prisoner, who had full power to cross-examine him; *Reg. v. Christopher*, 2 C. & K. 994; E. C. L. R. 61.

clude the operation of the rule; the deposition should be read to evidence the fact of the statement alluded to not being contained in it.^p

A witness may be re-examined by the party who called him, upon all the topics on which he has been cross-examined:^q this gives an opportunity of explaining any new facts which have come out upon cross-examination;^r but as the object of re-examining a witness is to explain the facts stated by the witness upon cross-examination, the re-examination is of course to be confined to the subject-matter of cross-examination.¹

Where the witness has been cross-examined as to declarations made by him, a counsel has a right, on re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but he has no right to go farther, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.^r

^p *Rex v. Taylor*, 8 C. & P. 726; E. C. L. R. 34. The absence of such statement in the deposition will not, however, preclude the prisoner from asking the question; *Reg. v. Curtis*, 2 Car. & K. 763; E. C. L. R. 61.

^q In the cases mentioned, *ante*, p. 194, where a witness, whose name is on the back of the indictment, not having been called for the prosecution, may be called by the judge and cross-examined by the prisoner, the counsel for the prosecution cannot examine him on any point which did not arise on the cross-examination, and perhaps cannot examine him at all; *R. v. Bezley*, 4 C. & P. 220; E. C. L. R. 19; *R. v. Harris*, 7 C. & P. 581; E. C. L. R. 32. This is a reason why the power, there alluded to, should be very rarely exercised by the judge; and why the rule, said to be laid down by the judges, that the prisoner should call such a witness as his own, (*Reg. v. Woodhead*, 2 Car. & K. 520, E. C. L. R. 61,) should be adhered to. It has, however, been held that the judge may direct the witness's deposition to be read for the purpose of contradicting his statement at the trial; *Oldroyd's case*, Russ. & Ry. 88.

^r *The Queen's case*, 2 B. & B. 297; E. C. L. R. 6. Thus, upon an issue whether a cargo which had been loaded on deck was improperly loaded, the plaintiff's witnesses, called to prove that loading part of the cargo on deck was dangerous, stated in cross-examination that it was usual on spring and fall voyages for ships in the particular trade to carry deck cargoes. On re-examination, they were asked whether deck cargoes shipped on fall voyages were at the risk of the ship-owner

¹ A witness may be re-examined by the party calling him even after a cross-examination, as well for the introduction of matter new in itself as for the purpose of explaining the expressions or the motives of the witness, when the omission to examine as to such new matter, when first called, arose from inadvertence or other cause to be approved by the court; *Clarke v. Voree*, 18 Wend. 193. G.

*It was formerly held that where a witness has been cross-examined as to a conversation with the adverse party in the suit, whether criminal or civil, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving him at the same time the benefit of the entire residue of what he said on the same occasion.¹ But in the *Queen's case* eleven of the judges were of opinion that the conversation of a witness with a third person stood upon a different footing, and was distinguishable from the case of *a conversation with a party, on the following grounds, viz.: "The conversation of a witness with a third person is not in itself evidence in the suit against any party in the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent

or the merchant; an objection to this question was held to have been properly overruled; *Goald and others v. Oliver*, 2 M. & G. 208; E. C. L. R. 40. So where, on the trial of *A.* for discharging loaded arms at *B.*, *B.* was cross-examined, with a view to discredit his evidence, as to whether he had not used violent language towards his father; having admitted it, he was allowed to be asked on re-examination how his father had acted towards him before he used that language; *R. v. St. George*, 9 C. & P. 483; E. C. L. R. 38. And on the trial of an action for a libel, imputing fraud to the plaintiff in betting against his own horse and then withdrawing him, a witness for the plaintiff having stated on cross-examination that, by the rules of the Jockey Club, the owner of a horse might bet against his own horse and then withdraw him, the witness was allowed to be asked on re-examination whether he did not consider such conduct to be dishonourable; *Greville v. Lamb*, 5 Q. B. 731; E. C. L. R. 48. Thus, even if the facts elicited on cross-examination are not strictly evidence, but are of a nature to prejudice the plaintiff, he may re-examine upon them, unless the defendant applies to strike them out; *Blewett v. Tregoning*, 3 Ad. & E. 554; E. C. L. R. 30.

¹ *Queen's case*, 2 B. & B. 298; E. C. L. R. 6.

¹ Where a witness is introduced by a party and is interrogated as to a particular fact and the opposite party on cross-examination asks him generally if he ever communicated that fact to any one and to whom, and he answers that he communicated it to the party calling him, this does not entitle the party calling him, to pursue the inquiry as to his own reply, and other conversation with the witness at the time of the communication. Otherwise, if the witness be asked on cross-examination specifically whether he made the communication to the party calling him; *Winchell v. Latham*, 6 Cow. 682.

declarations, and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations, has been laid before the court, the court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is irrelevant and incompetent.”

‘ Upon these grounds, eight of the judges (Best, J., *dissentiente*) were of opinion that if, on the trial of an action or indictment, a witness examined on behalf of the plaintiff or prosecutor, upon cross-examination by the defendant’s counsel, states that at a time specified he told A. that he was one of the witnesses to be examined against the defendant, and being re-examined by the plaintiff’s or prosecutor’s counsel, states what induced him to mention this to A., the plaintiff or prosecutor’s counsel cannot further re-examine the witness as to such conversation, even so far only as it relates to his being one of the witnesses.

Abbott, C. J., in delivering the opinion of the judges, observed: “The question, as proposed by the House, contains these words: ‘and being re-examined, had stated what induced him to mention to A. what he had so told him;’ by which I understand that the witness had fully explained *his whole motive and inducement* to inform A. that he was to be one of the witnesses; and so understanding the matter, and there being *no ambiguity in the words*, ‘I am to be one of the witnesses,’ I think there is no distinction between the previous and subsequent parts of the conversation, and I think myself bound to answer your Lordships’ question in the negative.”

His Lordship then gave the reasons of the eight judges for distinguishing between a conversation between the witness and a party, and one between the witness and a third person, to the effect above stated.

Best, J., was of opinion that the rule which was acknowledged to have been settled as to conversations of a party to the suit, applied with equal reason and force to the statements and conversations of a witness; and held, that if one part of the conversation of a witness has been drawn from him by cross-examination, with a view of disparaging his testimony, the whole of what passed in that cross-examination ought to be admitted on re-examination; that this is justly due to the character of the witness, who is entitled, in vindication of his character, to have the entire conversation fairly and fully detailed in evidence; it was due to him also, as a security against proceedings which might otherwise be instituted against him on statements partially extracted on cross-examination.

The Lord Chancellor and Lord Redesdale also differed from the majority of the judges. As the learned judges were pleased to guard their opinion by stating that they understood the question not to assume that the witness had fully explained his whole motive and inducement to inform A., the decision in the particular instance thus presented to them does not go the length of excluding the cotemporaneous statement made by the witness where it would be the best exposition of his real motives. And where a witness was asked, on cross-examination, as to part of a conversation between the plaintiff and defendant relative to the subject-matter of the action, of which conversation the plaintiff had informed the witness; it was held, that on re-examination he might properly be asked to relate the whole of that conversation; *Glynn v. Houston*, 2 M. & G. 337; E. C. L. R. 40.

*In the late case of *Prince v. Samo*^u the Court of Queen's Bench, after much deliberation, overruled this distinction, [*234 and laid down a rule, founded in good policy, that whether the witness be cross-examined as to a conversation with a party to the suit or with a third person, the re-examination must, in the former case, as well as the latter, be confined to matters connected with the evidence given on cross-examination, as tending to show its true nature and bearing. The action in that case was for a malicious arrest for money alleged by the plaintiff to have been given to him. The plaintiff called as a witness his attorney, who having been present when the plaintiff was examined as a witness on an indictment for perjury, stated, on cross-examination, that the plaintiff on the trial of the indictment admitted that he had repeatedly been insolvent and remanded by the court. It was proposed, on re-examination, to inquire whether the plaintiff had not also upon the same occasion stated the circumstances out of which the arrest had arisen, and what that statement was. Lord Denman, on the objection being taken, rejected the evidence* on the ground, [*235 "that the witness might be asked as to every thing said by the plaintiff on the trial of the indictment that could in any way qualify or explain the statement to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it." On a motion for a new trial the court held, that the same rule which applied to statements made by a witness applied also to those made by a party; and, after observing that the opinion of Lord Tenterden was extra-judicial, and not in terms adopted by Lord Eldon and the judges, who concurred in the answer to the proposed question, and was expressly denied by Lords Redesdale and Wynford, added: "In our opinion the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested. Nothing would be more easy than to find or imagine examples of the extreme injustice that might result from allowing such statements to be received; but none can be stronger than the actual case. Because the plaintiff was shown to have said that he was insolvent, he would have been allowed, without any reference to his own insolvency, to prove by his discourse at the same period every averment in his declaration, with every circumstance likely to excite prejudice and odium against the defendant; and if this were evidence, the jury would be bound to consider and give full

effect to it, and thus award large damages for an injury of which no particle of proof could be given excepting the plaintiff's own assertion."^v

*236] *A contrary rule would be supported by a specious, but in this and in several other instances a fallacious, principle; for whilst it may, at first view, seem to be conducive to enlarge views of policy and convenience to admit the whole of a particular conversation where part of it is given on evidence, and so to afford to the jury the most ample means for attaining to the truth, yet here the reverse is true; for were this to be allowed, parties apprehensive of the unjust consequences so forcibly represented in the foregoing judgment, would frequently be deterred from giving any such admission or statement by the adversary in evidence; and thus the means of information afforded to the jury would be narrowed rather than enlarged by the more extensive rule.

Where a witness, on cross-examination, varies from the statement made on his examination in chief, the party calling him (it has been held) may, on re-examination, inquire into facts to show that the witness had been induced to betray that party.^w

It has already been seen that a witness cannot obtrude evidence on cross-examination which he could not have given in chief; but if counsel voluntarily cross-examine as to inadmissible matter, the adverse counsel is entitled to re-examine upon it.^x

It seems that the court will, after a case is closed, allow a witness to be called back, or receive fresh evidence, to get rid of objections *237] which are beside the justice of the case, and little more than mere form, but not to get rid of *any difficulty on the

^v In *Sturge v. Buchanan*, 10 Ad. & E. 598, E. C. L. R. 37, a defendant produced, under a notice so to do, a book containing copies of letters written by him to his partners, and some of these having been read on the part of the plaintiff, the defendant claimed a right to read to the jury other letters upon the same subject copied in the same book, but not referred to in those read by the plaintiff: it was, however, held, that he had no right to do this; and the case of *Prince v. Samo* was cited and confirmed by the court. And see *Whitfield v. Aland*, 2 Car. & K. 1015; E. C. L. R. 61.

^w *Dunn v. Aslett*, 2 M. & Rob. 122, ante, p. 168. But where a witness for the plaintiff, not varying from his examination in chief, stated, on cross-examination by the defendant, important facts for the latter, by whom also he had been subpoenaed, the plaintiff was not allowed, on re-examination, to ask him whether he had not given a different account to the plaintiff's attorney; *Winter v. Butt*, 2 M. & Rob. 357; and see *post*, as to the right of a party to discredit his own witness.

^x *Blewett v. Tregoning*, 3 Ad. & E. 554; E. C. L. R. 30; 5 Nev. & M. 308; E. C. L. R. 36. And see *Greville v. Lamb*, 5 Q. B. 731; E. C. L. R. 48.

merits. Where the question was as to the petitioning creditor's debt on a bill of which the bankrupt was the drawer, and no proof of any default by the acceptor had been shown, the court allowed a witness to be called, after the case had been closed, to prove the dishonour and notice to the bankrupt.⁷

IV. *The mode of rebutting the testimony of witnesses.*

The credit of a witness may be impeached either by cross-examination, subject to the rules already mentioned, or by general evidence affecting his credit, or by evidence that he has before done or said that which is inconsistent with his evidence on the trial; or, lastly, by contrary evidence as to the facts themselves.¹

It is perfectly well settled that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts not relevant to the issue;^a for this would cause the inquiry, which ought to be simple and confined to the matters in issue, to branch out into an indefinite number of issues. The characters, not only of the witnesses in the principal cause, but of every one of the impeaching collateral witnesses, might be impeached by separate charges, and loaded with such an accumulated burthen of collateral proof, that the administration of justice would become impracticable. Besides this, no man could come prepared to defend himself against charges *which might thus be brought against him, without previous notice; and [*238 though every man may be supposed to be capable of defending his general character, he cannot be prepared to defend himself

⁷ *Giles v. Powell*, 2 Car. & P. 259; E. C. L. R. 12; S. P., *Walls v. Atcheson*, *ibid*, 268; and see 2 Phil. Evid. 409, 9th edit.; *Brown v. Giles*, 1 C. & P. 118; E. C. L. R. 12; S. P., *R. v. Watson*, 6 C. & P. 653; E. C. L. R. 25. But where the question was, which of two sisters had taken the plaintiff's house, and his witness, on his examination in chief, had said it was *E. D.*, but the defendant's witnesses gave evidence that it was the sister, Park, J., would not allow the first witness to be recalled, in order, now that he had seen *E. D.* in court, that he might speak more confidently as to her identity, observing that if he did so he must allow all the plaintiff's witnesses to be examined over again; *Roe v. Day*, 7 C. & P. 705; E. C. L. R. 32.

^a See Vol. II. tit. CHARACTER.

¹ A party who has cross-examined a witness may impeach him unless he has introduced new matter in the cross-examination; *People v. Moore*, 15 Wend. 419. If a party cross-examining a witness draws out facts material to the issue, other than those elicited by the party calling him, which are not satisfactory he may contradict or discredit them, by any legal proof; *Lewis v. Hodgdon*, 5 Shepley, 267

against particular charges of which he has had no previous notice.^b Questions put to a witness himself upon cross-examination are not, it may be observed, open to this objection, since his answer is conclusive as to all collateral matters. The proper question to be put to a witness for the purpose of impeaching the general character of another witness is, whether he could believe him upon his oath? When general evidence of this nature has been given to impeach the credit of a witness, the opposite party may cross-examine as to the grounds upon which that belief is founded.^{c1}

^b *R. v. Watson*, 2 Stark. C. 151; E. C. L. R. 3; 32 How. St. Tr. 458; Gurney's Rep. of same case, vol. ii. p. 288; *Layer's case*, 16 How. St. Tr. 285; *Rookwood's case*, 13 How. St. Tr. 210; B. N. P. 296; see also *Sharp v. Scoging*, Holt's C. 541; *De la Motte's case*, 21 How. St. Tr. 811; *Mawson v. Hartsink*, 4 Esp. C. 102.

^c *Mawson v. Hartsink*, 4 Esp. 102; *Sharp v. Scoging*, Holt, 541. Where a party states that he would not believe a witness on his oath, it is no objection that he has never heard him examined on his oath, if he have, from previous knowledge of his character, reasonable ground of belief that his word cannot be trusted on oath; *R. v. Bispham*, 4 C. & P. 392; E. C. L. R. 19.

¹ "A witness called to impeach or support the general character (reputation) of another," says Judge Swift, "is not to speak of his private opinion or of particular facts in his own knowledge; but he must speak of the common reputation among his neighbors and acquaintances. The only proper questions to be put to him, are—whether he knows the general character (reputation) of the witness intended to be impeached, in point of truth, among his neighbors; and what that character (reputation) is? Whether good or bad? The witness may be inquired of as to the means and opportunity he has of knowing the character (reputation) of the witness impeached; as long as he has known him; how near he lives to him; and whether his character has been a subject of general conversation; but his testimony must be founded on the common repute and understanding of his acquaintance as to truth, and not as to honesty, &c.;" Swift's Evidence, 143. See *Kimmel v. Kimmel*, 3 Serg. & Rawle, 336; *Wike v. Lightner*, 11 Serg. & Rawle, 198.

The credit of a witness may be impeached by showing that he was intoxicated at the time the transaction happened about which he testifies; *Tuttle v. Russell*, 2 Day, 201; Swift's Evid. 144.

It has been decided in North Carolina and Kentucky, that a party may impeach the general moral character of his adversary's witness, and is not confined to the question of his reputation for veracity; *State v. Stallings et al.*, 2 Hayw. 300; *Hume v. Scott*, 3 Marsh. 261. But the adverse party may afterwards inquire respecting the reputation of the witness in point of veracity; *Noel v. Dickey*, 3 Bibb, 258.

In Massachusetts, the credit of a female witness may be impeached, by showing that she is a common prostitute: *Commonwealth v. Murphy*, 14 Mass. Rep. 387; *Aliter* in New York; *Jackson v. Lewis*, 13 Johns. 504. M.

But the decision in *The Commonwealth v. Murphy*, if not overruled, seems to be confined in its application to the case in which a common prostitute is offered

In the next place, the witness may be contradicted by others who represent the fact differently, or by proof that he has said

as a witness; for where upon a complaint under Statute 1785, c. 66, § 2, for the maintenance of a bastard child, it was ruled, that evidence that the general character of the complainant for chastity, previous to her connection with the respondent was bad, and that she had previously had frequent criminal intercourse with other persons, was not admissible for the purpose of impeaching her credit as a witness; *Commonwealth v. Moore*, 3 Pick. Rep. 194. But in such a suit the woman herself may be asked on the cross-examination whether she had had criminal connection with any other man, about the time she charged the child to have been begotten, as such a question would be material and relevant to the issue, for, if answered in the affirmative, it would prove a fact rendering it impossible for her to have determined who was the father of the child; and she could not refuse to answer, on the ground that she would thereby criminate herself, having waived her privilege by voluntarily testifying to matters necessarily criminating herself upon her examination-in-chief; *Swift's Law of Evid.* 80.

I.

Evidence of character is admissible to discredit a witness, but it must go to his general character and not to specific facts; *Wike v. Lightner*, 11 Serg. & Rawle, 198; *Kimmel v. Kimmel*, 3 Serg. & Rawle, 336; *The State v. Parks*, 3 Iredell, 296; *Ramsey v. Johnson*, 3 Penna. Rep. 293; *Chess v. Chess*, 1 Penna. Rep. 32; *Barton v. Morphey*, 2 Dev. 520; *Walker v. The State*, 6 Blackf. 1; *Rixey v. Bayce*, 4 Leigh, 330; *Frye v. Bank of Illinois*, 11 Illinois, 367; *Hoitt v. Moulton*, 1 Foster, 586; *Gilbert v. Sheldon*, 13 Barb. 623; *Nugent v. The State*, 18 Ala. 521.

That the evidence must go to the character of the witness for truth and veracity, and not to general character; see *Jackson v. Lewis*, 13 Johns. 504; *Gilchrist v. McKee*, 4 Watts, 380; *The State v. Howard*, 9 N. Hamp. 485; *Wilds v. Blanchard*, 7 Vermont, 141; *Commonwealth v. Moore*, 3 Pick. 194; *Bakeman v. Rose*, 14 Wend. 105; *United States v. Vansickle*, 2 McLean, 219; *Phillips v. Kingfield*, 1 Appleton, 375; *The State v. Bruce*, 11 Shepley, 71; *Spears v. Forrest*, 15 Verm. 435; *Bakeman v. Rose*, 18 Wend. 146; *The State v. O'Neale*, 4 Iredell, 88; *Crane v. Thayer*, 18 Verm. 162; *Sorrelle v. Craig*, 9 Alabama, 534; *Commonwealth v. Churchill*, 11 Metc. 538; *Ford v. Ford*, 7 Humph. 92.

Contra, *Hume v. Scott*, 3 A. K. Marsh. 260; *Tuckett v. May*, 3 Dana, 79; *Johnson v. The People*, 3 Hill, 178; *The State v. Boswell*, 2 Dev. 209; *Day v. The State*, 13 Missouri, 422.

But evidence of the general good character of a witness is inadmissible when his general character has not been impeached, although an attempt has been made to prove facts inconsistent with his testimony, and to show that he had been privy to a fraud; *Rogers v. Moore*, 10 Conn. 13; *Pratt v. Andrews*, 4 Comst. 493; *Braddee v. Brownfield*, 9 Watts, 124; *Starks v. The People*, 5 Denio, 106; *The People v. Gay*, 3 Selden, 378; *Wester v. May*, 9 Harris, 274; except when he is a stranger; *Mesnam v. Railroad*, 20 Conn. 354.

And except when the witness and person injured in an indictment for an attempt to commit a rape was deaf and dumb; *State v. De Wolf*, 8 Conn. 93; so generally in a case of rape; *Turney v. The State*, 8 Smedes & Marshall, 104.

A party has a right to impeach the general character of a witness for his adversary, though the testimony which such witness has given related solely to the general character of another witness; *Starks v. The People*, 5 Denio, 106.

or written that which is inconsistent with his present testimony; for this purpose a letter may be read in which he has given a different account of the matter.^d

It is a general rule, that whenever the credit of a witness is to be impeached by proof of any thing that he has said, or declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said or declared, or done that which *239] is intended to be proved. *For in every such case there are two questions: first, whether the witness ever did the act or used the expressions alleged; secondly, whether his having done so impeaches his credit, or is capable of explanation.^e It would be manifestly unjust to receive the testimony of the adver-

^d *De Sailly v. Morgan*, 2 Esp. C. 691. The action was by a schoolmaster, for the board and education of the defendant's sons: the defence was, his neglect of the scholars, &c. A witness for the plaintiff, the usher of the school, swore that the treatment of the scholars was proper; and, to contradict him, a letter written by him to a former scholar, containing immoral matter, was read in evidence.—So a prisoner (*ante*, pp. 229, 230) or a prosecutor, in a criminal case, may contradict a witness by means of his deposition before the magistrate; *Oldroyd's case*, R. & B. C. C. 88, see *ante*, p. 231, and *post*, vol. ii. tit. DEPOSITIONS. The courts of Scotland exclude such evidence, upon the principle that the witness ought to deliver his testimony unfettered by previous declarations; Hume's Com. on Crim. Law of Scotland, vol. ii. p. 367; Burnet's Treatise, p. 467. The policy of this rule is, to say the least, questionable; if it relieve a well-disposed witness from embarrassment in stating the truth, it also relieves a fraudulent one from the difficulty of explaining a statement made at a time when he was under no temptation to deceive, and thereby excludes a considerable test of credit. An honest witness will disclose the truth in spite of any prior declaration; a dishonest one would certainly be encouraged by the exclusion. It seems to be the wiser policy not to yield a test of truth, at a certain sacrifice, for the sake of an advantage so doubtful.

^e The *Queen's case*, 2 B. & B. 300; E. C. L. R. 6. The following questions were proposed by the House of Lords to the judges: "If a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declaration made by him, or as to acts done by him, to procure persons corruptly to give evidence in support of the prosecution, would it be competent to the party accused to examine witnesses in his defence, for the purpose of proving such declarations or acts, without first calling back the witness to be examined or cross-examined as to the fact whether he ever made such declarations or did such acts?" Again: "If a witness, called on the part of a plaintiff or prosecutor, gives evidence against the defendant, and if, after cross-examination, they discover that the witness so examined has corrupted or endeavored to corrupt another person to give false testimony in such cause, whether the defendant's counsel may not be permitted to give evidence of such corrupt act of the witness, without calling him back?" The judges held, that the proposed proof could not, in either case, be adduced, without a previous cross-examination of the witness as to the subject-matter.

sary's *witness to prove the fact, without also admitting the party's witness to deny it; and assuming the act to have [*240 been done, or expression used, it would also be unjust to deny to the party, or the witness who admits the act or expression, the best or, it may be, the only means of explanation.^{f1}

If the witness admit the words, declaration, or act, proof on the other side becomes unnecessary, and an opportunity is afforded to the witness of giving such reasons, explanations, or exculpations of his conduct, if any there be, as the circumstances may furnish; and thus the whole matter is brought before the court at once, which is the most convenient course.⁵

If the witness deny the words, declaration, or act imputed to him, then, if it be not a matter collateral to the cause, witnesses may be called to contradict him.^h But it is not enough to ask a witness (in order to found a contradiction) the general question whether he has ever said so and so; he must be asked as to the

^f It is upon this principle that statements by a deceased attesting witness to a document cannot be given in evidence upon proof of his signature. Thus, in *Stobart v. Dryden*, 1 M. & W. 615, it was held that evidence of declarations by a deceased attesting witness, whose signature was proved, that he had forged or fraudulently altered the instrument, was inadmissible.

⁵ By the judges, in the *Queen's case*, 2 B. & B. 313; E. C. L. R. 6.

^h 2 B. & B. 313, E. C. L. R. 6, and *supra*; *Long v. Hitchcock*, 9 C. & P. 619; E. C. L. R. 38.

¹ In general, a witness cannot be impeached by proving that at other times he made contradictory statements, unless he has been interrogated as to such statements; *McKinney v. Neil*, 1 McLean, 540; *Everson v. Carpenter*, 17 Wend. 419; *Franklin Bank v. Steam Navigation Co.*, 11 Gill & Johns. 28; *Able v. Shields*, 7 Missouri, 120; *Doe v. Reagan*, 5 Blackford, 217; *The State v. Marter*, 2 Alabama, 43; *Weaver v. Traylor*, 5 Ibid. 564; *Garrett v. The State*, 6 Missouri, 1; *McAleer v. McMullen*, 2 Barr, 32; *Weinsorpflin v. State*, 7 Blackf. 286; *Kay v. Fredrigal*, 3 Barr, 221; *Regnier v. Cabot*, 2 Gilman, 34; *Downer v. Dana*, 19 Verm. 338; *Palmer v. Haight*, 2 Barb. Sup. Ct. 210; *Howell v. Reynolds*, 12 Alabama, 128; *Clapp v. Wilson*, 5 Denio, 285; *Williams v. Turner*, 7 Georgia, 348; *Johnson v. Kinsey*, Ibid. 428; *Moore v. Bettis*, 11 Humph. 67; *Clementine v. The State*, 14 Missouri, 112; *King v. Wicks*, 20 Ohio, 87; *Sprague v. Caldwell*, 12 Barb. 516; *Carlisle v. Hunley*, 15 Alabama, 623; *Nelson v. Iverson*, 17 Ibid. 216; *Conrad v. Griffey*, 16 How. 38.

The rule does not however apply when the evidence to impeach the witness is his sworn deposition previously taken in the same cause; *Williams v. Chapman*, 7 Georgia, 467.

It has been held however in some cases not to be matter of error to permit such evidence but to rest altogether in the sound discretion of the court; *Hedge v. Clapp*, 22 Conn. 262; *Kay v. Fredrigal*, 3 Barr, 221.

time, place, and person involved in the supposed contradiction,ⁱ or some other circumstance^j sufficient to point out the particular occasion. So, if the statement imputed to the witness be contained in any writing, it must be put into his hand, and he must be asked if it is in his handwriting.^j

If the witness neither directly admit nor deny the act or declaration, as where he merely says that he does not recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the *adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said, by answering that he did not remember.^k

If the witness decline to answer on account of the tendency of the question to criminate him, the adverse party is still at liberty to adduce the same proof.^l And the possibility that the witness may on that ground decline to answer affords no sufficient reason for not giving him the opportunity of answering with a view to explain the circumstances and to exculpate himself.^m And it is of great importance that this opportunity should be thus afforded, not only for the reasons thus suggested, but because such explanation, if not given in the first instance, may be rendered impossible; for a witness who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the court, and may not be found or brought back until the trial is at an end.ⁿ

ⁱ *Angus v. Smith*, Mood. & M. 473; E. C. L. R. 22; *Andrews v. Askey*, 8 C. & P. 7; E. C. L. R. 34; *Crowley v. Page*, 7 C. & P. 789; E. C. L. R. 32.

^j *Crowley v. Page*, 7 C. & P. 789; E. C. L. R. 32.

^k *Crowley v. Page*, 7 C. & P. 789, E. C. L. R. 32, *cor.* Parke, B., who observed, "If the witness, on cross-examination, admits the conversation imputed to him, there is no necessity for giving further evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice. If the rule were not so, you could never contradict a witness who said he could not remember." Tindal, L. C. J., is stated to have ruled the contrary in an *earlier* case; *Pain v. Beeston*, 1 M. & Rob. 20. And see *Long v. Hitchcock*, 9 C. & P. 619; E. C. L. R. 38.

^l *The Queen's case*, 2 B. & R. 314; E. C. L. R. 6.

^m *Ibid.*

ⁿ By the judges, in *The Queen's case*, 2 B. & R. 314; E. C. L. R. 6.

ⁱ A witness is not bound to answer as to how he testified on a former trial, relative to the matter in question, if he objects to the inquiry; *Mitchell v. Hinman*, 8 Wend. 667.

If indeed the witness's moral character be relevant to the issue, as in an action for seduction where the seduced person is examined, evidence that the witness has used expressions inconsistent with such character may be given, without first asking the witness whether they have *been used. But if the expressions would be contradictory to the evidence she has given in the cause, and evidence of them is tendered simply by way of contradiction, they cannot be proved without asking the witness the previous question, although they are in themselves relevant to the issue. Thus where, in an action for seduction of the plaintiff's daughter, she proved that the defendant seduced her and was the father of her child, and stated that she did not know *A. B.*, evidence that she had said that *A. B.* was her seducer and the father it was held could not be given by way of contradicting her, without first asking her whether she had said so.*

There is no distinction for these purposes between declarations made by the witness, and acts done by him which relate to the cause;† in the one case as well as the other, an opportunity must be afforded the witness of explaining his conduct before evidence is adduced to impeach his credit by proof of the fact.

If the adverse counsel has omitted to lay such a foundation by previously interrogating the witness on the subject of those declarations, the court will of its own authority, call back the witness, in order that the requisite previous questions may be put.‡ And even although the fact to be adduced in order to impeach the witness's testimony be not discovered until after the conclusion of the cross-examination, the rule still holds; and evidence cannot be given for the purpose of thus impeaching his testimony without previous examination of the witness, even although the witness should have departed the court, and cannot be brought back after the discovery has been made.†

The witness having been asked on cross-examination, if he has not used particular expressions, in order to lay *a foundation for contradicting him; upon his denial, the witness †called to prove that he did use them may be asked as to the particular words read from the brief.‡

* *Carpenter v. Wall*, 11 A. & E. 803; E. C. L. R. 39.

† *The Queen's case*, 2 B. & B. 311; E. C. L. R. 6.

‡ By the judges, in *The Queen's case*, 2 B. & B. 314; E. C. L. R. 6.

† *The Queen's case*, 2 B. & B. 312; E. C. L. R. 6.

§ *Edmonds v. Walter*, 3 Stark. C. 8; E. C. L. R. 3; S. P., *Hallett v. Cousens*, 2 M. & Rob. 238; ante, p. 171.

The evidence tendered by way of contradiction must be legitimate evidence of the facts or statement; thus, in order to impeach the credit of a witness for a defendant upon an information for assaulting revenue officers, by proving his previous testimony on an information before two magistrates against the same defendant for having smuggled goods in his possession, proof of the conviction containing the testimony of the witness is insufficient; it is necessary to prove it by the testimony of those who heard what was said.[†] The record of conviction is conclusive for the purpose for which it is intended, that is, to prove the condemnation; but it is no evidence to prove the testimony of the witnesses.

After proof in a criminal proceeding that the prosecutor has employed *A. B.*, an agent, to procure and examine witnesses in support of the charge, it is not competent to the defendant to examine a witness to prove that *A, B*, who is not examined as a witness, had offered a bribe to give evidence upon the trial, or to bring papers with him belonging to the defendant; for the mere employment of an agent for the purpose of procuring and examining witnesses is in itself an innocent, and in many cases a necessary act, and it is not to be presumed that the prosecutor directed the agent to use any unlawful means for the purpose; neither can any legitimate inference or conclusion be drawn from this fact against the credit and veracity of the witnesses who are examined; for it is not to be presumed, in the absence of all proof, that they were either parties to the illegal act or privy to it, or to any act of the like nature.[‡]

*As upon an indictment for a conspiracy it is competent
*244] to the prosecutor to prove, in the first instance, the existence of a conspiracy, by general evidence, without proving participation by the defendant,[§] so it is competent to a defendant on a criminal charge, first to prove a conspiracy to suborn witnesses for the destruction of his defence, and afterwards to affect the prosecutor by proof of his participation,^{||} provided proof of such a conspiracy would afford a legitimate ground of defence.[¶]

A party cannot discredit the testimony of his own witness, by

[†] *R. v. Howe*, 1 Camp. 461, *cor. Ld. Ellenborough*.

[‡] By the judges, in *The Queen's case*, 2 B. & B. 302; E. C. L. R. 6.

[§] Vol. II. tit. CONSPIRACY; 2 B. & B. 303; E. C. L. R. 6.

^{||} *The Queen's case*, 2 B. & B. 303, 309; E. C. L. R. 6.

[¶] 2 B. & B. 311; E. C. L. R. 6. *Quære*, In what cases proof of a crime committed by a prosecutor in so conspiring can afford any legal defence to a defendant?

general evidence of incompetency; for it would be unfair that he should have the benefit of the testimony if favourable, and be able to reject it if the contrary.¹

Where, however, a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires, he is not precluded from calling other witnesses who give contradictory testimony.² And even where a witness by surprise gives evidence against the party who called him, that party will not be precluded from proving his case by other witnesses; for it would be contrary to justice that the treachery of a witness should exclude a party from establishing the truth by aid of other testimony. And their testimony, which would have been admissible had they been called first, cannot in principle be excluded by the circumstance of being called in a different order.² Accordingly, where a plaintiff had called the servant of the defendant to prove

¹ *Per* Buller, J., B. N. P. 297; see also *Hastings's trial*, 2 Hawk. c. 46, s. 196, Curwood's edition: nor can he object to the admissibility of evidence, after having allowed it to be given; *Webb v. Smith*, Ry. & M. 106; E. C. L. R. 21.

² As in the remarkable case of Mr. Joliffe's will. See tit. WILL; and see *Alexander v. Gibson*, 2 Camp. 556.

¹ *Dean v. Hamilton*, Tayl. 14; *Sawrey v. Murrell, et al.*, 2 Hayw. 397, acc. Where one witness is contradicted by another who is called by the same party, the first cannot be called to disprove what the second has testified; *Rapp v. Le Blanc, et al.*, 1 Dallas, 63.

In North Carolina, it has been held, that in criminal prosecutions the Attorney-General may discredit a witness called by him to testify on the part of the State; *State v. Norris*, 2 Hayw. 429.

Aliter in Maryland; *Queen v. The State*.

M.
I.

² A party cannot impeach the character of his own witness; but he may prove by others that the account given by his witness is incorrect; *Lawrence v. Barker*, 5 Wend. 301; *Winston v. Moseley*, 2 Stewart, 137; *Farr v. Thompson*, Cheves, 37; *Stockton v. Demuth*, 7 Watts, 39; *Spencer v. White*, 1 Iredell, 236; *Brown v. Osgood*, 25 Maine, 505; *Shelton v. Hampton*, 6 Iredell, 216; *Bradford v. Bush*, 10 Alabama, 386; *Wolfe v. Hanon*, 1 Gill, 84; *Chamberlain v. Sands*, 27 Maine, 458; *Hunt v. Fish*, 4 Barb. S. C. Rep. 324; *The People v. Safford*, 5 Denio, 112; *Keutgen v. Parks*, 2 Sanf. S. C. Rep. 60; *Thompson v. Blanchard*, 4 Comst. 303; *Hice v. Cox*, 12 Iredell, 315; *Swamscot Machine Co. v. Walker*, 2 Foster, 457; *Bank of Kentucky v. Shier*, 4 Rich. 233; *Buckhalter v. Edwards*, 16 Georgia, 593; *Hall v. Houghton*, 37 Maine, 411; *Scavy v. Dearborn*, 19 N. Hamp. 351; *Brown v. Wood*, 19 Missouri, 475.

The rule that a party cannot discredit his own witness does not apply to those cases where the party is under the necessity of calling the subscribing witnesses to an instrument; *Dennett v. Dow*, 5 Shepley, 19; *Williams v. Walker*, 2 Rich. Eq. 291; *Shorey v. Hussey*, 32 Maine, 579.

a warranty of a horse, upon which the action was founded, and the witness denied that he warranted the horse, the plaintiff was allowed to *prove the fact by means of other witnesses.^{*1}

*245] A witness called by the plaintiff in an action on a policy of insurance against fire, to prove the sale of goods to the plaintiff, and swore, on his examination in chief, that an invoice of the goods in his handwriting was made out by him after the fire, and that a letter, in his handwriting, was in fact written in London, at the plaintiff's house, and by his desire, and that the plaintiff's son and shopman had persuaded him to say that he had sent the goods. Lord Tenterden refused to allow the son and shopman to be called again to negative this statement, but the Court of K. B. granted a new trial, for the evidence was offered to prove a material fact relevant to the issue, and it was held that, by such evidence, a party might contradict his own witness.^b

Where a party, being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be repudiated. The whole is, it seems, open to the consideration of the jury.^c

Doubt has been entertained on the question whether it be competent to a party to impeach the testimony of his own witness as to a particular fact, by proof that on a former occasion he gave a different account, and so to contradict him by his own statement. The resolution of this doubt depends, as it seems, on the consideration whether, in the abstract, such evidence is essential to justice, and if so, then whether the party is to be excluded from such evidence, either by reason of any objection in the nature of an

^a *Alexander v. Gibson*, 2 Camp. 556; and see *Richardson v. Allan*, 2 Stark. C. 334; E. C. L. R. 3: *Ever v. Ambrose*, 3 B. & C. 746; E. C. L. R. 10; *Friedlander v. The London Assurance Company*, 4 B. & Ad. 193; E. C. L. R. 24; *Wright v. Beckett*, 1 M. & Rob. 429.

^b *Friedlander v. The London Assurance Company*, 4 B. & Ad. 193; E. C. L. R. 24.

^c *Bradley v. Ricardo*, 8 Bing. 57; E. C. L. R. 21.

¹ *Jackson v. Varick*, 7 Cow. Rep. 239. The defendants introduced a devisee to prove the execution of a bond to which his name appeared to be signed as a witness. He was sworn generally as a witness in the cause and denied that he had ever witnessed the bond. The plaintiff's counsel then insisted upon cross-examining him in support of the right, to which the defendants objected on the ground of his interest as a devisee, but it was held that having introduced him as a witness they could not question either his competency or credibility.

estoppel, or of any collateral inconvenience which might result. As a general proposition, it is essential to *justice that, in a case where the testimony of two witnesses upon a question [*246 of fact is contradictory, every aid should be afforded to enable the jury to decide which of them is better entitled to credit. And there can be no doubt that, in such a case, the knowledge that one of those witnesses on a former occasion gave an account of the matter inconsistent with his present testimony is of importance in order to enable them to form a correct conclusion. It is admitted on all hands that a party may, by such means, impeach the credit of his adversary's witness; and it is manifest that a third party, vested with the discretion of calling what witnesses he thought fit for the ends of justice, would, in the exercise of that discretion, submit the contradiction to the jury. It has indeed been decided, in a criminal case, that it is competent to a judge to do this. Upon the trial of an indictment for murder,^a the judge, in his discretion, thought fit to call as a witness the mother of the prisoner, whose name was indorsed on the indictment, but who had not been called by the counsel for the prosecution. Her evidence tended to acquit the prisoner, and the judge, with a view to impeach her credit, referred to her deposition; and all the judges were of opinion that it was competent to the judge to do so; and it is material to observe, that Lords Ellenborough and Mansfield intimated that the prosecutor had the same right.

If, as an abstract position, it be essential to the ends of truth that such evidence should be submitted to a jury, it remains to consider, in the first place, whether the party having called the witness is, as it were, to be estopped from afterwards so impeaching his credit. It is difficult to come to this conclusion. A party who is prepared with general evidence to show that a witness whom he calls is wholly incompetent, acts unfairly and inconsistently; for knowing his witness to be undeserving of credit, he offers *him to the jury as the witness of truth, and attempts [*247 to take an unfair advantage, by concealing or disclosing the real character of his witness, as best serves his purpose. But a party may contradict his own witness in the mode in question, without incurring any such blame; he may have been purposely deceived by the witness, or, though not under a legal necessity to

^a *R. v. Oldroyd*, Russ. & Ry. C. C. L. 88. So, *per* Lord Lyndhurst, C. B., *R. v. Maddox and others*, Lancaster Sp. Ass. 1834; 1 Stark. on Evid. 606, 3rd edit.

call him, may be constrained by paucity of evidence under the particular circumstances; as where he cannot easily prove some other fact except by the testimony of that witness, or where the not calling him might afford a ground for strong observation against him. It may frequently happen in such cases that a party may with great propriety call a witness as to a particular fact, and yet impeach his testimony upon another material fact, of which the witness, without intending to deceive, may have obtained but an imperfect knowledge, or in respect of which his memory may have erred.

It may happen that, although under no legal necessity to call a particular witness, he may have none other than an adverse witness to prove a material fact. In such a case, it would frequently be attended with great hardship to preclude the party from using such means as he possessed, to show that the witness admitted only such facts as he could not with safety deny, but misrepresented some other material fact in which he could not be contradicted, and where the testimony, though false, would not expose him to a prosecution for perjury. It might happen, for instance, that in an action by two partners, for goods sold and delivered, an adverse witness might be the only one who could be called by the plaintiffs to prove the sale and delivery; a fraudulent witness as to this might be obliged to state the truth, for fear of a prosecution for perjury, but still he might with safety defeat the action by proof of payment to himself, as the agent of the plaintiffs, or by other evidence which would not expose him to a prosecution for perjury. In such, and many other cases which might be put, it *248] would be a harsh rule to exclude the party *from defeating the attempt by evidence of the witness's own statements on the subject.¹

In the case of an adverse witness, it may frequently happen that what he states in favour of the party who calls him may be regarded as truth unwillingly wrung from a reluctant witness, whilst his counter-statements are open to great suspicion; in all such cases, former declarations by the witness are obviously of importance, with a view to ascertain what part of his statement

¹ Although a party calling a witness shall not be allowed to impeach his general character, yet he may show that he has told a different story at another time; *Cowden v. Reynolds*, 12 Serg. & Rawle, 281; *State v. Norris*, 1 Hay. 429; *Webster v. Lee*, 5 Mass. Rep. 334; see also *Brown v. Bellows*, 4 Pick. 179. G.

ought to be discredited, whilst credit is given to the rest. The ordinary rules, as to the examination of an adverse witness, supply an analogy in favour of the affirmative of the present question, in all cases at least where the witness is apparently an adverse one. Considering the admission of such evidence, in its tendency to occasion collateral inconvenience, the argument that a party ought not to be allowed to discredit his own witness, by general evidence, seems to have little weight; the contradiction proposed being plainly distinguishable, as already observed, from any general impeachment of the witness's character, by evidence showing him to be altogether unworthy of credit. It would, as was observed in the case of *Friedlander v. The London Assurance Company*,^{*} be against all justice that the whole of a man's testimony should be struck out because a witness sets him right as to a single fact. A party may with perfect propriety and consistency insist on the general competency of his witness, although he alleges that his testimony as to one particular fact is erroneous. It may be urged that the practice may open a door to collusion, and that a jury may mistake such a statement for substantive evidence. The suspicion of collusion in such a case is at most but weak, when it is considered how remote would be the expectation of benefit to be derived from it. A party might, no doubt, by such means, fraudulently introduce into the evidence a former statement by his own witness* in his favour; but it could not be of any use, unless the jury, against the direction of the judge, should regard it as substantive evidence. The latter objection would operate with equal force to exclude such evidence, when offered to impeach the adversary's witness.

It has been truly observed, that to allow the evidence of a party's own witness to be impeached by other evidence to the contrary, is not founded on any principle generally warranting such an impeachment of credit by the party who calls the witness, for the witnesses are not called directly to discredit the first witness; the impeachment of his discredit is incidental and consequential only. But although the practice of contradicting by other evidence may supply no affirmative argument for contradiction by the witness's own statement, it is observable that such practice shows that the discrediting of the witness is not a consequence which ought to exclude such evidence as the justice of the case may

^{*} 4 B. & Ad. 193; E. C. L. R. 24. By Parke, Taunton, and Patteson, Js.

otherwise require. The admission of this kind of evidence seems to stand upon a substantive reasonable foundation. For such a course is in the abstract essential to the forming a correct estimate of the respective degrees of credit due to conflicting witnesses; and it is at most but doubtful whether the exclusion of such evidence is warranted upon any collateral grounds of convenience. In the case of *Wright v. Beckett*,¹ Lord Denman having received such evidence, the case was argued before Lord Denman and Mr. Baron Bolland, as Judges of the Court of Common Pleas at Lancaster; Lord Denman cited the case of *Bernasconi v. Fairbrother*, in which he had received similar evidence, and in his judgment on *250] the principal case he adhered to the same opinion.² *Mr. Baron Bolland was of opinion that the evidence was inadmissible, and Lord Denman stated that others of great weight and authority agreed with Mr. Baron Bolland. And notwithstanding the reasons above suggested, the prevailing opinion seems to be that a party who calls a witness is not at liberty thus to impeach his credit and nullify his testimony. In the more recent case of *Holds-worth v. The Mayor of Dartmouth*,³ an action against the corporation on a bond, which they defended on the ground that it had been obtained by fraud, the defendants called several persons, in order to establish this, who were members of the corporation at the time the bond was given, and took part in giving it. One of them on cross-examination stated that the transaction was, as far as he knew, honest and correct. On re-examination he denied having told the defendants' attorney that it was a shameful transaction, whereupon the defendants' counsel proposed to call the attorney to prove that he had said so, but this being objected to, Parke, B., rejected the evidence, observing, that he never had any doubt that Bolland, B., was right in the case above cited, and added, that a party has no right to put a witness into the box as a witness of credit, and when he gives unfavourable evidence to call evidence to contradict him, and that it made no difference whether the fact was elicited on the examination in chief or on cross-examination. In *Alley v. Hutchings*,⁴ also, Wightman, J., rejected similar evi-

¹ 1 M. & Rob. 427. In the case of *Ewer v. Ambrose*, 3 B. & C. 746, E. C. L. R. 10, cited below, Mr. J. Bayley seemed to be of opinion (although it was unnecessary to decide the point) that the answer in Chancery was inadmissible altogether. Holroyd and Littledale, Justices, expressed no opinion.

² And again in *Dunn v. Aslett*, 2 M. & Rob. 122.

³ 2 M. & Rob. 153.

⁴ 2 M. & Rob. 358.

dence; and in *Winter v. Butt*,^j Erskine, J., ruled the same way, observing that he had previously done so on one occasion with the approbation of Patteson, J., and that he had since talked with several of the other judges, and found that in their opinion the above-mentioned decision of Parke, B., was right.

It is observable, that the case of a witness thus giving evidence of a fact tending to negative the claim made by *his party is distinguishable from that of a witness who denies all know- [251 ledge of the fact, or simply fails in proving the fact which he is called to prove. In the former, it may be essential to justice that the jury, who might otherwise attribute too much credit to the testimony of the witness, should be supplied with the means to enable them to judge of the degree of credit which they ought to give; but in the latter, the witness proving nothing, his credit is immaterial, and what he stated upon a former occasion cannot be received as substantive evidence.^k Upon the trial of Warren Hastings, the judges delivered the following answer, by the Lord Chief Baron, to a question proposed by the House of Lords:—“That where a witness, produced and examined in a criminal proceeding by the prosecutor, *disclaimed all knowledge* of any matter so interrogated, it is not competent for such prosecutor to pursue such examination by proposing a question containing the particulars of an answer supposed to have been made by such witness before a Committee of the House of Commons, or in any other place, and by demanding of him whether the particulars so suggested were not the answers he had so made.”^l In the case of *Ewer v. Ambrose*,^m a witness, called by the defendant, to prove a partnership between himself and the defendant, having denied the fact, an answer of the witness in Chancery was offered in evidence by the defendant’s counsel, and admitted. It was left to the jury to find for the plaintiff or defendant, according to the credit given to the witness’s answer in Chancery or in court. After a verdict for the defendant, the court granted a new trial, on the ground that the answer was not substantive evidence of the fact.

^j 2 M. & Rob. 357.

^k *Ewer v. Ambrose*, 3 B. & C. 746; E. C. L. R. 10.

^l Journ. D. P., Ap. 10, 1788. The witness had been asked by the managers for the Commons whether he had not been examined before a Committee of the House of Commons, and whether he had not before that Committee given a particular answer to a particular question.

^m 3 B. & C. 746; E. C. L. R. 10.

*252] V. *The mode of confirming the testimony of witnesses.*

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination or by the testimony of other witnesses;^a but if the character of a witness has been impeached, although upon cross-examination only, evidence on the other side may be given to support the character of the witness^b by general evidence of good conduct.

Where the character of a witness is impeached by general evidence the party who calls him is at liberty to examine the witnesses as to the grounds of their belief; and in all cases where the credit of a witness has been attacked, whether by general evidence or by particular questions put upon cross-examination, it seems that the party who called him is at liberty to support his testimony by general evidence of good character.^c So if the character of the attesting witness to a deed or will be impeached on the ground of fraud, evidence of his general good character is admissible,^d whether he be living or dead. But mere contrariety between the testimonies of adverse witnesses, without any direct imputation of fraud on the part of either, supplies no ground for admitting general evidence as to character.^{e1}

^a *Bishop of Durham v. Beaumont*, 1 Camp. 207. But only for this purpose; he may not introduce new matter for other purposes than explaining the motives or statements of the witnesses; *R. v. St. George*, 9 C. & P. 483; E. C. L. R. 38; *Queen's case*, 2 B. & B. 297; E. C. L. R. 6; *Prince v. Samo*, 7 Ad. & E. 627; E. C. L. R. 34.

^b *R. v. Clarke*, 2 Stark. C. 241; E. C. L. R. 3. Where the prosecutrix, upon an indictment for an attempt to commit a rape, had been cross-examined as to her having been sent to the house of correction on a charge of theft, evidence of her subsequent good conduct was admitted in support of the prosecution; *Annesley v. Anglesea*, 17 How. St. Tr. 1139.

^c See *R. v. Clarke*, 2 Stark. C. 241; E. C. L. R. 3.

^d *Doe dem. Walker v. Stephenson*, 3 Esp. C. 284; *Bishop of Durham v. Beaumont*, 1 Camp. C. 210; *Doe dem. Stephenson v. Walker*, 4 Esp. C. 50; *Provis v. Reed*, 5 Bing. 435; E. C. L. R. 15.

^e *Bishop of Durham v. Beaumont*, 1 Camp. 207.

¹ It is now well settled that whenever the character of a witness for truth is attacked in any way, whether by cross-examination or by general evidence of want of character for truth, or by proving statements made by him out of court different from those sworn to, it is competent for the party calling him to give general evidence of his good character; *Paine v. Tilden*, 20 Verm. 554; *Hadjo v. Gooden*, 13 Alabama, 718; *Sweet v. Sherman*, 21 Vermont, 23.

Contra, *Stamper v. Griffin*, 12 Geo. 450.

*Where an attested document is disputed on the ground of fraud, and one of the attesting witnesses impeaches the credit of the other attesting witnesses, general evidence may be given of the good character of the latter, for the credit due to their attestation is put in issue by the evidence on the other side.^a It seems to be the better opinion, that a witness cannot be confirmed by proof that he has given the same account before, even although it has been proved that he has given a different account, in order to impeach his veracity; for his mere declaration of the fact is not evidence. His having given a contrary account, although not upon oath, necessarily impeaches either his veracity or his memory;^b but his having asserted the same thing does not in general carry his credibility further than, nor so far as, his oath.^{c1} But although such evidence be not generally admissible in confirmation of a witness, there may be many cases where under special circumstances it possibly might be admissible; as,

^a *Doe dem. Walker v. Stephenson*, 3 Esp. C. 284; 4 Esp. C. 50; 1 Camp. 210.

^b But evidence of declarations by a deceased attesting witness who has not been examined cannot be proved, even to show that he forged the document; *Stobart v. Dryden*, 1 M. & W. 615; and therefore, of course, witnesses cannot be called to support his character on that score.

^c B. N. P. 294. Buller, J., was clearly of opinion that such evidence was not admissible to support an unimpeached witness, and doubted whether it was evidence in reply; *R. v. Parker*, 3 Doug. 242; E. C. L. R. 26. In the case of *The Berkeley Peerage*, 5th June, 1811, Lord Redesdale held that, in general, declarations made by a witness at another time could not be examined into for the purpose of supporting his testimony; and he referred to a case where Lord C. J. Eyre rejected such evidence when offered for the prisoner in a case of perjury. On the other hand, see *Gilb. Ev.* 135; *Lutterel v. Raynell*, 1 Mod. 282; *Friend's case*, 4 St. Tr. 613; *Harrison's case*, 12 How. St. Tr. 861.

¹ When a witness testifies to a fact, and evidence is introduced to impeach his credit, he may be corroborated by evidence of what he had testified or stated on former occasions; *Henderson v. Jones*, 10 Serg. & Rawle, 322; *Cooke v. Curtis*, 6 Har. & Johns. 86; *Coffin v. Anderson*, 4 Blackford, 395; *Beauchamp v. The State*, 6 Ibid. 300; *The State v. George*, 8 Iredell, 324; *Dossett v. Miller*, 3 Sneed. 72.

Where a witness is discredited by testimony against his general character, testimony to show that he has formerly made the same statement as that to which he now testifies is not admissible; *Gibbs v. Linsley*, 13 Vermont, 208. Contra, *The State v. Dove*, 10 Iredell, 469; *Pleasant v. State*, 15 Ark. 624. Proof of declaration made by a witness out of court, in corroboration of testimony given by him on the trial of a cause is as an almost universal rule, inadmissible; *Robb v. Hackley*, 23 Wend. 50; *Dudley v. Bolles*, 24 Ibid. 465; *Smith v. Stickney*, 17 Barb. 489; *The People v. Finnegan*, 1 Parker C. R. 147.

for instance, in contradiction of evidence tending to show that the account was a fabrication of late date, and where consequently it becomes material to show that the same account had been given *254] before its ultimate effect and operation,* arising from a change of circumstances, could have been foreseen. So, where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that any thing should have been contrived and devised for the private advantage of the party, is sometimes admissible in evidence; as upon an indictment for a rape,^v or upon an action for a trespass and assault committed on the wife.^w

Where a register of baptism stated the child to be seven years of age at the time of baptism, it was held that the entry was no evidence to prove the age, on an issue to try whether the party was of age when he was arrested. But Bayley, J., expressed an opinion, that if it could have been shown that the entry had been made upon the representation of the mother, who was called as a witness for her son, in order to prove his minority, the fact would have been admissible to support her testimony upon its being impeached.^x

Unless there be some legislative provision to the contrary, it is no objection that a witness called to support the appellant's case before a court of appeal was not examined before the original court,^y even although the party who obtained the conviction is liable to double costs on a reversal of the conviction.

^v *R. v. Clarke*, 2 Stark. C. 242; E. C. L. R. 3; *Brazier's case*, East's P. C. 443. Such evidence would appear to be properly admissible only as confirmatory evidence where the witness's credit is impeached; *Reg. v. Megson*, 9 C. & P. 420; E. C. L. R. 38; *R. v. Guttridge*, 9 C. & P. 471; E. C. L. R. 38; *R. v. Walker*, 2 M. & Rob. 212. It seldom, however, happens that, in such a case as that of rape, an attempt is not made to impeach the credit of the witness.

^w *Thompson and his wife v. Trevanion*, Skinn. 402; 6 East, 193; and see *Rex v. Foster*, 6 C. & P. 325; E. C. L. R. 25.

^x *Wißen v. Law*, 3 Stark. C. 63; E. C. L. R. 3.

^y *R. v. Commissioners of Appeals*, 3 M. & S. 133; *Breedon v. Gill*, 1 Ld. Raym. 219; *S. C.*, Salk. 555.

*CHAPTER II.

[*255]

WRITTEN EVIDENCE.

WRITTEN INSTRUMENTS are, *first*, of a public nature; *secondly*, of a mixed nature, partly public and partly private; *thirdly*, of a private nature. *Public* documents,* *again, are either [256] judicial; or, *secondly*, not, judicial; and, with a view to their means of proof; they are either, *first*, of record; or, *secondly*, not of record. We will proceed to consider them in this order, and to treat not only of their admissibility and effect, but also of the mode in which they are to be proved.^b

* The statute 1 & 2 Vict. c. 94, provides for the establishment of a record office, and places under the superintendence of the Master of the Rolls all the older general records of the realm. Those specifically mentioned in the Act are the records then deposited in the Tower, Chapter House of Westminster, Rolls Chapel, Petty Bag Office, the Office of the Queen's Remembrancer, Augmentation Office, First Fruits and Tenths Office, Office of the Land Revenue and Enrolments, or of the late Auditor of the Land Revenues, formerly in the Office of Pells, and then in the custody of the Comptroller of the Exchequer; the records of the Court of Chancery, Exchequer, Admiralty, Queen's Bench, Common Pleas, and Marshalsea, wherever then deposited, and all the records of the lately abolished Courts of the Principality of Wales, Palatinates of Chester and Durham, and Isle of Ely. The Queen is empowered in Council to place any other records under the same superintendence; and the Master of the Rolls is to appoint persons to receive and take charge of the accumulating records of these various Courts, from time to time after they are twenty years old, subject to certain regulations. He is also to make rules for the admission of such persons as ought to be admitted to the use of such records. The statute authorizes him or the deputy keeper to allow copies to be made, and declares it to be expedient "to allow the free use of any public records as far as stands with their safety and integrity, and with the public policy of the realm." The principal portion of these records are at present kept in the Stone Tower in Westminster Hall, in the Rolls Chapel, in the Carlton Ride, and in the Tower of London. An order of the court, or a judge, is now necessary before issuing a *subpoena* for the production of these documents, R. G., 6 C. B. 424; but the original can now rarely be necessary, as by s. 13 a certified copy of any of them, sealed with the seal of the Record Office, is evidence in every case in which the original record could have been received. See the sections, *post*, p. 262, note (n).

^b If the production of any document be injurious to the public interest, the production or even the inspection of it will not be granted. The principle which privileges persons from giving parol evidence equally applies to the production of written instruments; *Home v. Bentinck*, 2 B. & B. 130; E. C. L. R. 6; *Smith v. East India Company*, 1 Phil. 50; *Cooke v. Maxwell*, 2 Stark. C. 183; E. C. L.

I. *Documents of a Public Nature.*

Before the admissibility and effect of public documents are considered, it will be convenient to consider *generally* the means by which public documents are to be procured^e and proved.^o

If the question be as to the existence or contents of a *record* in the same court, the trial is by inspection of the record itself.^d Where the disputed record is one of another court, the tenor may *257] be obtained by means of a **certiorari* and *mittimus* out of Chancery;^e for it would be inconvenient to remove the original. Where the record of an inferior court is disputed in a superior court, the record itself, where it is necessary, and in other cases the tenor, may be removed by *certiorari* out of Chancery,^f or out of the Queen's Bench, if the proof is needed there.^g In criminal cases, where a prisoner pleads *autrefois acquit*, he may remove the record by *certiorari*, if he be arraigned in the King's Bench.^h In other cases, he may remove the tenor of the record of acquittal into Chancery by *certiorari*, and either produce it in court with his own hands, (*en poigne*,) or procure it to be sent to the justices *sub pede sigilli*.ⁱ But the record in such case must be removed by writ,

R. 3; *Wyatt v. Gore*, Holt, N. P. C. 299. In *R. v. Staffordshire, Justices*, 6 Ad. & E. 99, E. C. L. R. 33, the court considered that they could enforce by *mandamus* the production of any document of a public nature in which any subject could prove himself to be interested, and that any officer appointed to keep records ought to deem himself a trustee for such a person, but the court would not interfere, unless the person applying had such an interest. There are, however, some records which are open to all, thus the inspection and exemplification of the records of the Queen's Courts are of right; 3 Co., preface, and stat. 46 Edw. III., there copied.

^e See tit. INSPECTION and PUBLIC DOCUMENTS.

^d *Nul tiel record* was pleaded to the Composition Act; 2 Salk. 566. Holt, C. J., held that an exemplification was necessary, although a copy printed by the King's printer would be sufficient evidence before a jury; *Anon.* 2 Salk. 566, *infra*, p. 231. The record or document itself must also, it has been thought, be produced in case of forgery or perjury, *sed quære*; see FORGERY—PERJURY—RECORD.

^e *Pitt v. Knight*, 1 Saund. 98; *Hewson v. Brown*, 2 Burr. 1034; *Luttrell v. Lea*, Cro. Car. 297.

^f *Butcher and Aldworth's case*, Cro. Eliz. 821; *Guilliam v. Hardy*, 1 Ld. Raym. 216.

^g 2 Atk. 317; *Guilliam v. Hardy*, 1 Ld. Raym. 216.

^h 20 E. 2, Coron. 232; Stark. Crim. Pl. 318. The usual practice is for the clerk of assize or of the peace to make up the record, and produce it in court without writ; see 1 Russ. on Crimes, 829, 837.

ⁱ 2 Hale, 242; 2 E. 3, 26, Coron. 150.

although the justices may receive a record without writ, where it is to be proceeded on for the King.^j

A record may be proved either, first, by *mere production*, without more; or, secondly, by *copy*.

Copies of records are either *exemplifications*; or, *secondly*, copies made by the authorised officer; or, *thirdly*, sworn copies.

First. Exemplifications. These are, exemplifications under the great seal; or under the seal of a particular court.^k The reason of admitting a copy to be evidence in such cases, is the inconvenience to the public of removing such documents, which may be wanted in two places at the same time.^l A record to be exemplified under the great seal must either be a record of the Court *of Chancery, which is the centre of all the courts, or must be removed thither by *certiorari*.^m Nothing but records can be given in evidence exemplified under the great seal, for these are presumed to be preserved by the court free from erasure or interlineation, to which private deeds which are in the hands of private persons, are subject.ⁿ Where any record is exemplified the whole must be exemplified, for the construction must be gathered from the whole taken together.^o An exemplification under the broad seal is of itself a record of the greatest authenticity.^p And where an exemplification of a commission of the time of Elizabeth was produced from the proper custody, and there was a slip of parchment at the foot, corresponding in size and form with the slips on which the great seal is usually affixed, the court allowed it to be read as a complete exemplification.^q [*258]

As to exemplifications under the seal of the court. The seals of the King's courts of justice are of public credit, and are part of the constitution of the courts, and supposed to be known to all;^r and this, whether the court has existed from time beyond memory,

^j 2 Hale, 242; 8 E. 4, 18, B. Coron. 218.

^k Gilb. Law of Ev. 12.

^l Bac. Ab. Ev. F.

^m Bac. Ab. Ev. F.; B. N. P. 226; 3 Ins. 173; 10 Co. 93, a.

ⁿ B. N. P. 227; Bac. Ab. Ev. F.; 3 Ins. 173; Gilb. Law of Ev. 12.

^o 3 Ins. 173; Gilb. Law of Ev. 17. But this rule is to be taken with some restriction; *vide* B. N. P. 227.

^p Gilb. Law of Evid. 14; Bac. Ab. Ev. F.; Sid. 145; Hard. 118; Plowd. Com. 411.

^q *Beverley v. Craven*, 2 M. & Rob. 140.

^r Gilb. Law of Ev. 17, 20; 10 Co. 93, a.

or has been recently created by Act of Parliament.⁵ But the seals of private courts and persons are not receivable in evidence, unless *259] proved to be the seals of the respective courts or persons.⁶ *In general the exemplification of any record under the seal of one of the King's courts of justice is sufficient.⁷ So is an exemplification of a commission and return under the seal of the Exchequer,⁸ of a record of the great sessions in Wales, or in a county palatine, under the seal of the court.⁹ Or of the proceedings of the ecclesiastical courts.¹⁰ So is an exemplification of the pope's bull, under the seal of a bishop.¹¹ Or of the grant of administration with the will annexed, under the seal of the archbishop.¹² So the exemplification of the enrolment of a fine or recovery in Wales, or in the counties palatine, under the appropriate judicial seal, is evidence of such fine or recovery.¹³ But the mere production of an exemplification under the seal of an university is not evidence, without proof that a party is entitled to his degree;¹⁴ neither is the exemplification of the judgment or decree of any foreign court admissible without proof of the seal of the court.¹⁵ And if a foreign court has an official seal, it ought to be used for the purpose of authenticating its judgments; and no copy by

⁵ Sid. 2, 146; Gilb. Law of Ev. 20. The courts are directed to take judicial notice of the Seal of the Record Office, 1 & 2 Vict. c. 94, s. 13; and Common Law Seal, and Seal of the Enrolment Office in Chancery, 12 & 13 Vict. c. 109; and copies under those seals may, to a certain extent, be regarded as exemplifications. The sections are given at length, *post*, pp. 262, note (n), 263, notes (p), (q).

⁶ Gilb. Law of Ev. 20; and therefore, formerly, it seems to have been the practice to deliver an exemplification under the seal of a court to a jury, but not to deliver a document under a private seal, because the authenticity of the latter depended upon a collateral oath; Gilb. Law of Ev. 17, 18, 19. The common seal of the city of London proves itself; *Doe dem. Woodmas v. Mason*, 1 Esp. 53; *Olive v. Gwyn*, 2 Siderf. 145; *S. C.*, Hardres, 118; *sed vide Moises v. Thornton*, 8 T. R. 303.

⁷ 10 Co. 93, a.

⁸ *Tooker v. The Duke of Beaufort*, Say. 297.

⁹ *Tooker v. The Duke of Beaufort*, Say. 297; Hard. 120.

¹⁰ 1 Ford's MSS. 166.

¹¹ Hard. 118.

¹² *Kempton v. Cross*, 8 G. 2, B. R. H. 108, although it merely recite the fact; *Shepherd v. Shorthose*, 1 Str. 412.

¹³ By the stat. 27 Eliz. c. 9, s. 8, they are of as great force as the record; *Olive Gwyn*, 2 Sid. 145.

¹⁴ *Henry v. Adey*, 3 East, 221; *vide infra*, JUDGMENTS, PROOF OF.

¹⁵ *Moises v. Thornton*, 8 T. R. 303.

any officer of the court will be considered as of authority in this country.⁴¹

⁴ *Black v. Lord Braybrooke*, 2 Stark. C. 7; E. C. L. R. 3; and *Appleton v. Lord Braybrooke*, *ib.*; *Anon.* 9 Mod. 66.

¹ "Full faith and credit shall be given in each State, to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof;" Const. U. S., Art. IV., Sect. 1.

The Statute of the United States, passed May 26th, 1790, provides, "that the records and judicial proceedings of the courts of *any State* shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." By the second section of a supplementary statute, passed March 27th, 1804, all the provisions of the statute of 1790 are made to apply as well to the public acts, records, judicial proceedings and courts of the respective *territories* of the United States, and *countries subject to the jurisdiction* of the United States, as to the public acts, &c., of the several States."

Under this section of the Constitution and the statute of 1790, the judgment of a State court has the same credit, validity and effect, in every other court in the United States, which it has in the State where it is pronounced: if in the courts of such State it has the faith and credit of record evidence, it must have the same faith and credit in every other court; *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234; and note by the reporter.

Whether a will of lands duly proved and recorded in one State, so as to be evidence in the courts of that State, is thereby rendered evidence in the courts of another State, (provided the record on its face shows that it possesses all the solemnities required by the laws of the State where the land lies,) under this section of the constitution, *Quære*, *Darby's Lessee v. Meyer, et al.* 10 Wheat. 469.

The above provision in the constitution has no effect upon judgments in criminal prosecutions, but only on judgments in civil actions: such judgments only were intended to be affected by this provision as can be carried into effect by the aid of the courts of States in which they were not rendered—but fugitives from justice found in one State, cannot be directly nor collaterally affected by any judgment against them in the State from which they have fled; *Commonwealth v. Green*, 17 Mass. Rep. 546.

Under the statute of 1790, the Supreme Court of the United States have decided that a copy certified by the clerk without a certificate of the presiding judge that the attestation is in due form, is not admissible in evidence in the courts of another State or District, &c.; *Drummond's Admrs. v. Magruder & Co's Trustees*, 9 Cranch, 122. It had been previously held, in Pennsylvania that a copy not certified according to the statute was *prima facie* evidence, though not conclu-

**Secondly*. Copies made by an authorized officer. Where
 *260] the law entrusts a particular officer with the making of

sive; *Baker et al. v. Field*, 2 Yeates, 532. And in North Carolina, that the statute was only affirmative, and did not abolish former modes of authentication; *Ellmore v. Mills*, 1 Hayw. 359.

If the clerk of a court certify at the foot of a paper purporting to be a record, "that the foregoing is truly taken from the record of the proceedings of his court," and if the judge, chief justice or presiding magistrate, certify that such attestation of the clerk is in due form of law, it is to be presumed that the paper so certified is a full copy of all the proceedings in the case, and it is admissible in evidence; *Ferguson v. Harwood*, 7 Cranch, 408. *Aliter*, if the writings do not purport to be a record, but a new transcript of minutes from the docket of the court. *Ibid*.

A record of another State informally certified, cannot be read, even on a question of discharging on common bail; *Craig v. Brown*, 1 Peter's C. C. Rep. 352. And to make a record of a court of one State evidence in another, the attestation must be according to the form used in the State from which the record comes; and the only evidence of this fact is the certificate of the presiding judge of that court. *Ibid*. See also *Smith v. Blagge*, 1 Johns. Cas. 238. A certificate of a presiding judge, stating that the person, whose name is signed to the attestation of the record, is clerk, and that the signature is his handwriting, is not in conformity with the requirements of the statute; *Craig v. Brown, ubi sup*. Whenever the court, whose record is certified, has no seal, this fact should appear, either in the certificate of the clerk or in that of the judge; Per Washington, J., *Ibid*. See also *Alston v. Taylor*, 1 Hayw. 395. The attestation by the clerk, of the record of a judgment in another State, must have the seal of the court annexed to it, and it is not sufficient that such seal is annexed to the certificate of the judge; *Turner v. Waddington*, C. C. Oct. 1811, MS. Wharton's Digest, 224. A record of another State, attested by the clerk, with the seal of the court annexed and the certificate of two judges, stating it to be in due form, one of them stating himself to be the judge "that presided, and one of the judges of the superior courts of law of said State," and the other stating himself to be "the senior judge of the court of law of said State," was held in Kentucky to be an insufficient authentication; *Stephenson v. Bannister*, 3 Bibb, 369.

In those States where a justice of the peace holds a court of record; where he is the sole justice and has no clerks; he may certify that he is the presiding magistrate and clerk of the court, that there is no seal, and that the attestation is in the usual form; and a copy of the record thus certified would be admissible in evidence. But a copy of a record of a judgment rendered by a justice in another State, authenticated only by his certificate, stating that it is a true copy of the files and records remaining in his office, is not sufficiently proved either at common law or according to the statute of the United States; *Bissell v. Edwards*, 5 Day, 363.

A decree in chancery must be authenticated according to the statute of 1790; *Barbour v. Watts*, 2 Marsh. 293.

A record of a court of the United States is not within the above-mentioned statute, and if under the seal of the court and certified by the clerk as a copy, it is evidence in the State courts; *Pepoon v. Jenkins*, 2 Johns Cas. 119. So the record of a court of a territory was held, in Kentucky, not to be within the provision of

copies, it also gives credit to them in evidence without further proof, although a mere office copy by a person not so licensed is

the constitution and the statute, and the record of such court attested by the clerk, with the seal of the court, together with the certificate of the Governor and the great seal that the person attesting was clerk and that his attestation was in due form, was decided to be sufficiently authenticated; *Haggin v. Squire*, 2 Bibb, 334. See *The statute of March 27th, 1804, above stated.* M.

As to exemplification of foreign judgments it has been held that where the court has no seal, the certificate of the clerk, accompanied with proof of his handwriting and that it is authenticated in the usual form, is sufficient; *Packard v. Hill*, 7 Cowen, 434; *Torbert v. Wilson*, 1 Stew. & Port. 200; *Craig v. Brown*, Pet. C. C. 352; *Allen v. Thaxter*, 1 Blackf. 399; *Buttrich v. Allen*, 8 Mass. 273.

The record of condemnation of a vessel in a foreign court of Vice Admiralty is not evidence *per se*. The seal must be proved by a witness who knows it or the handwriting of the judge or clerk must be proved, or it must be shown that it is an examined copy. The consular certificate is not sufficient to authenticate it; *Cartlett v. Ins. Co.*, Paine, 594. On the other hand it has been held in Connecticut that the record of a foreign Vice Admiralty Court purporting to be certified by the deputy registrar, under the seal of the court is admissible without any other proof of its authenticity; *Thompson v. Stewart*, 3 Conn. 171. A judicial record, authenticated only by the great seal of a foreign sovereign State, is evidence in our courts, although it is not accompanied by any certificate of its being a copy of an original record, under the official signature of any officer of the court; *Griswold v. Pitcairn*, 2 Conn. 85. The proceedings of a Vice Admiralty Court of a foreign nation were held to be sufficiently verified, by proof of the handwriting of the judge and of the registrar of the court to a certificate that the papers were a true copy from the records; *Mumford v. Bowne*, Anthon, 40.

The public seal of a State, affixed to the exemplification of a law proves itself; it is a matter of notoriety, and will be taken notice of, as part of the law of nations acknowledged by all; *Robinson v. Gilman*, 7 Shep. 299. Courts of the United States are domestic tribunals, whose proceedings State Courts are bound to respect and receive when exemplified under the seal of the court, which the State courts are presumed to know; and the same rule applies to a United States court established in a territory; *Wernock v. Dearman*, 7 Port. 513; *Redman v. Gould*, 7 Blackf. 361; *Williams v. Wilkes*, 2 Harris, 228.

A record of a State court, certified by the clerk under its seal, being good evidence in another court of the same State, is also admissible in the United States courts in that State; *Mewster v. Spalding*, 6 McLean, 24.

The best proofs of the proceedings of a foreign court, are the original records; but the testimony usually produced is either a sworn copy, by one who has compared it with the original proceedings or an exemplified copy, certified by the clerk and the presiding judge, and the seal of the court with the broad seal of the province or kingdom of the appointment of the judge, with the proper certificate from the office of appointment; either of these will be sufficient; *Spaulding v. Vincent*, 24 Vermont, 501; *Steward v. Swanzy*, 23 Mississippi, 502. When a copy of a judgment recovered in Canada, was certified by the clerk, and purported to be under the seal of the court, and a witness testified that he knew the clerk in that

inadmissible.¹ The chirograph of a fine is evidence of the fine itself, because the chirographer is an officer appointed by the law

* Bac. Ab. Ev. F.; B. N. P. 229.

¹ Where copies are made evidence by statute, the mode of authentication must be strictly pursued. The copy may be strictly accurate, yet if the certificate be defective, it is of no avail; *Smith v. United States*, 5 Peter's, 292. A copy is not admissible upon the certificate of the officer having the custody of the document unless the law authorizes him to certify copies; *Strother v. Christy*, 2 Missouri, 148; *State v. Cake*, 4 Zabriskie, 674. If the law does not authorize an instrument to be recorded, a certified copy will not be admissible; *Caale v. Harrington*, 7 Har. & Johns. 147; *Haile v. Palmer*, 5 Missouri, 403; *Webster v. Harris*, 16 Ohio, 490; *New York Dry Dock v. Hicks*, 5 McLean, 111.

capacity and helped him to compare the copy with the original and knew it to be correct and knew the seal of the court, it was held sufficient; *Pickard v. Bailey*, 6 Foster, 152.

As to exemplifications of judgments and other records under the Acts of Congress it has been held sufficient that the presiding judge should certify that the clerk was such at the date of the certificate; *Merriweather v. Garvin*, 2 Port. 199; *Johnson v. Howe*, 2 Stew. 27. The certificate of the presiding judge is sufficient evidence of the fact that he holds that position; *Hutchinson v. Patrick*, 3 Missouri, 45.

The Act of Congress, prescribing the mode of authenticating the Acts of the several Legislatures, declares that such Acts shall be authenticated by having the seal of their respective States affixed thereto. An Act certified by the Secretary of State, to which is appended a certificate of the Governor with the seal of the State affixed, certifying to the official character of the person signing himself as Secretary, and that full faith and credit are to be given to his official acts, is not a compliance with the Act of Congress; *La Fayette Bank v. Stone*, 1 Scam. 424.

Where one State court is abolished and its jurisdiction is transferred to another court, the clerk and presiding judge of the latter court are competent to authenticate the records of the former in the manner prescribed by the Act of Congress so as to make them admissible in evidence in the courts of another State; *Capen v. Ernery*, 5 Metc. 436. The office copy of a deed in another State is such a record as must be authenticated under the Act of Congress, to make it evidence; *Pennel v. Weyant*, 2 Harring. 502. A certificate of a clerk of the court of another State, under his private seal, if he certifies that there is no seal of the court, and the presiding judge certifies that the certificate is in due form, is good; *Strode v. Churchill*, 2 Litt. 75.

A court is not prohibited from receiving a record, although not certified according to the Act of Congress, if proved as a foreign record; *Lathrop v. Blake*, 3 Barr, 483; *Duvall v. Ellis*, 13 Missouri, 203; *Settle v. Allison*, 8 Georgia, 201.

Any State may prescribe rules for the authentication of judicial records, in order to make them admissible in evidence, provided such rules are not inconsistent with the Acts of Congress on this subject, and a record is admissible which conforms to the provisions of the Acts either of Congress or of the Legislature of the State

to make out such copies; but the chirograph is not evidence of the levying of a fine with proclamations, as the officer is not appointed

in which the record is sought to be used in evidence; *Ordway v. Conroe*, 4 Wisconsin, 45.

To let in the exemplification of the probate of a will in the courts of Alabama, under the Act of Congress, no particular form of certificate is necessary. If the record is attested by the clerk, and his attestation is certified by the presiding judge to be in due form, it is immaterial how the attestation is made; *White v. Strother*, 11 Alab. 720.

A document attested by the clerk of a court with its seal, and the certificate of its presiding judge and called an "exemplified copy" is competent evidence of the judgment described in it under the Act of Congress, though it may not conform to the mode at common law or in the State where the judgment was rendered; *Taylor v. Carpenter*, 2 Woodbury & Minot, 1.

The certificate to the record of a judgment rendered in one State to be used in another, by the first justice, is not sufficient under the Act of Congress, unless it appear that the first justice is the chief justice or presiding magistrate; *Hudson v. Daily*, 13 Alab. 722; *Stewart v. Gray*, 1 Hempstead, 94.

The certificate of a justice of the peace of a sister State, that one who attests a copy of a deed recorded in that State is clerk, is not such authentication as will authorize the reading of the copy in evidence. It is necessary that the certificate be by the judge, chief justice or presiding magistrate of the court; *Waller v. Cralle*, 8 B. Monroe, 11.

A copy certified by a surrogate who acted as his own clerk, under his official seal, but without his certificate that the attestation is in due form, held not admissible in evidence; *Catlin v. Underhill*, 4 McLean, 199; but with such attestation it is sufficient; *State v. Hinchman*, 3 Casey, 479.

The record and judicial proceedings of a county court in Virginia were certified by a person who styled himself presiding magistrate of the county, held inadmissible since it did not appear that he was presiding magistrate of the court; *Settle v. Allison*, 8 Georgia, 201.

The certificate of a judge to the exemplification of a record of another State, that the attestation of the clerk is in due form is sufficient, though he may not certify directly to the official character of the clerk; *Linch v. McLemore*, 15 Alabama, 632.

The record is not duly authenticated without a certificate that the attestation of the clerk is in due form; *Trigg v. Conway*, 1 Hempstead, 538; *Wilburn v. Hall*, 16 Missouri, 426; *Thompson v. Manrow* 1 California, 428; *Shown v. Barr*, 11 Iredell, 296.

The form of the certificate attesting the judgment of a court of another State depends on the usage of the State whence the record comes; and if the judge certifies that it is in due form, this will be sufficient without setting out the form; *Regan v. McCormick*, 4 Harrington, 435; *Lewis v. Sutliff*, 2 Greene, 186; *Schoonmaker v. Lloyd*, 9 Richardson Law Rep. 173.

Where the judge is described as judge of the court, without saying that he is the judge or the sole judge, where there is nothing on the face of the record pro-

to make copies of them.^f So a copy of a judgment made out, examined, and indorsed by the clerk of the court, is not in itself evidence, for he is intrusted as to the keeping only of records, and not with the making out copies of them.^g So where a deed enrolled is lost, a copy of the enrolment by the clerk of the peace is not admissible in evidence, for he is empowered merely to authenticate the deed itself by enrolment, and not to make out copies of the enrolment.^h So an entry in a book of the First Fruits Office, of the collation and admission of a parson to a rectory, is secondary evidence of a return made by the bishop to a writ issued by the Court of Exchequer to the bishop to ascertain the value of the first fruits and twentieths, the bishop having discharged a public duty in making the return, and faith being given that he would perform that duty correctly.ⁱ The indorsement of
 261] the date of enrolment is conclusive evidence of the enrolment, for it is part of the record.^j

^f B. N. P. 229, 230; Bl. Com. 409, b.; Com. Dig. Ev. A. (2); *Chettle v. Pound*, Trin. Ass. 1700; Bac. Ab. Ev. F.; *Doe v. Bluck*, 6 Taunt. 486; E. C. L. R. 1. But now, by 11 & 12 Vict. c. 70, all fines are to be conclusively deemed to have been levied with proclamation, unless in the case of lands held at the passing of the Act under a title adverse to, or inconsistent with, the operation of the fine, in which case it is incumbent on the party alleging the fine to have been levied with proclamations to prove it.

^g Bac. Ab. Ev. F.; B. N. P. 229.

^h Bac. Ab. Ev. F.; and see *Appleton v. Lord Braybrooke*, 2 Stark. C. 6; E. C. L. R. 3; and *Black v. Lord Braybrooke*, 2 Stark. C. 7; E. C. L. R. 3; B. N. P. 229.

ⁱ *Irish Society v. Bishop of Derry*, 12 Cl. & F. 641.

^j *The King in aid of Reed v. Hopper*, 3 Price, 495, in the case of an enrolment of a bargain and sale. So in cases of the enrolment of memorials of annuity deeds, *Garrick v. Williams*, 3 Taunt. 340; and deeds under the Mortmain Acts; *Doe v. Lloyd*, 1 M. & G. 671; E. C. L. R. 39; *Rex v. Sewell*, 8 Q. B. 161; E. C. L. R. 55. And, by 12 & 13 Vict. c. 109, s. 12, a certificate of enrolment in the Petty Bag Office, purporting to be sealed with the Chancery Common Law seal, and by s. 18, a certificate of enrolment in the Enrolment Office, purporting or

duced to show that the court is composed of more than one judge, the authentication is sufficient; *Central Bank of Georgia v. Veasey*, 14 Arkansas, 672.

As to the judgments of justices of the peace it has been decided that they are admissible if authenticated in the same manner as foreign judgments are authenticated; *Mahurin v. Bickford*, 6 N. Hamp. 567; *Lawrence v. Gaultney*, 1 Cheves, 7; *Gay v. Lloyd*, 1 Iowa, 78.

An exemplification of the record of a judgment of a justice of the peace of a sister State, certified according to the Act of Congress, is competent evidence in Kentucky; *Scott v. Cleveland*, 3 Monroe, 62.

Office copies of judicial proceedings, other than those last mentioned, that is, copies made by the known officers of the court, seem to be admissible for particular purposes in the same, but not in another court.^h With respect to causes depending in Chancery, it is said that office copies are the very records of the court, and prove themselves, and that no other copy can be produced therein;ⁱ but such copies are not admissible in other courts.^m

By various statutes also copies of records and other judicial proceedings are rendered admissible in evidence, if certified by certain officers, and sealed with the seal of the *office or Court. The first and principal of these is the statute [*262 relating to the custody of the public records, which, after directing that all the public records, including among others those of the Courts of Chancery, Exchequer, Admiralty, Queen's Bench, Common Pleas and Marshalsea, shall be placed under the care of the Master of the Rolls and a deputy keeper of records, provides that copies of any of these certified by the deputy keeper of the records, or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the Record Office, shall be admissible in evidence without further proof.ⁿ The recent

appearing to be sealed with the seal of the Chancery Enrolment Office, shall be admitted in evidence without further proof. These certificates are by those sections directed to be made on the instruments and to state the day of enrolment, of which the certificate is also made evidence. A memorandum of enrolment of a lease, on the margin of the lease, signed "A. B., Auditor," is sufficient proof that the lease has been enrolled with the auditor of the Duchy of Lancaster; *Kinnersly v. Orpe*, 1 Doug. 56.

^k In general, an office copy is admissible in evidence in the same court and in the same cause, but not in a different cause, though in the same court; *per* Lord Mansfield, in *Denn v. Fulford*, Burr. 1177; *Pitcher v. King*, 1 Car. & K. 655; E. C. L. R. 47. Of course, when a writing is admitted under a judge's order to be a true copy, it is admissible without further proof; *Davies v. Davies*, 9 Car. & P. 252; E. C. L. R. 38.

^l *Denn v. Fulford*, Burr. 1177.

^m 1 Bl. 289; *Black v. Lord Braybrooke*, 2 Stark. C. 7; E. C. L. R. 3; and it is said to have been held at *nisi prius* that upon the trial of an issue out of Chancery, office copies of depositions in Chancery in the same cause were not receivable; *Burnand v. Nerot*, 1 C. & P. 578; E. C. L. R. 12; but see the opinion of Littledale, J., in *Highfield v. Peake*, M. & M. 109; E. C. L. R. 22; Vol. II. tit. OFFICE COPY.

ⁿ 1 & 2 Vict. c. 94, s. 13. Though all the records then existing in the various courts were transferred by this statute, yet the future were not at once; but a provision is contained in the Act (s. 3) by which the accumulating records of the age of twenty years may from time to time be brought under the custody of the

statute,^o likewise, for the regulation of the Petty Bag Office, and the practice of the Common Law side of the Court of Chancery, and the Enrolment Office in Chancery provides that a copy of
 *263] any document, sealed with the Common *Law,^p or Enrolment^a Office Seal, shall be deemed a true copy, and be

Master of the Rolls. The statute is more fully referred to, *ante*, p. 255, where the particular records mentioned in it are specified. The clauses which provide for the making of copies are ss. 12 and 13, and they provide (s. 12), "That the Master of the Rolls or Deputy Keeper of the Records may allow copies to be made of any records in the custody of the Master of the Rolls, at the request and cost of any person desirous of procuring the same; and any copy so made shall be examined and certified as a true and authentic copy by the Deputy Keeper of the Records or one of the Assistant Record Keepers aforesaid, and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made." And (s. 13) "that every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any Committee of either House, without any further or other proof thereof, in every case in which the original record could have been received there as evidence."

^o 12 & 13 Vict. c. 109.

^p Sect. 11 having directed that a Chancery Common Law seal, of which all courts are to take judicial notice, shall be provided, s. 13 enacts that every office copy issued shall be sealed with the said Chancery Common Law seal, and "That every document sealed with such seal, and purporting to be a copy of any record, or other document of any description, shall be deemed to be a true copy of such record or other document, and shall, without further proof, be admissible and admitted and received in evidence, as well before either House of Parliament, as also before any committee thereof, and also by and before all Courts, Tribunals, Judges, Justices, Officers, and other persons whomsoever, in like manner, and to the same extent and effect as the original record or other document would or might be admissible, or admitted, or received, if tendered in evidence, as well for the purpose of proving the contents of such record or other document, as also proving such record or other document to be a record or document of, or belonging to, the said Court of Chancery, but not further or otherwise."

^a Sect. 17 directs a seal or stamp to be provided, of which all courts shall take judicial notice; sect. 19 enacts, "that every document or writing, sealed or stamped, or purporting or appearing to be sealed or stamped with the said seal of the Chancery Enrolment Office, and purporting to be a copy of any enrolment or other record, or of any other document or writing of any description whatsoever, including any drawings, maps, or plans thereunto annexed or endorsed thereon, shall be deemed to be a true copy of such enrolment, record, document, or writing, and of such drawing, map, or plan (if any) thereunto annexed, and shall, without further proof, be admissible and admitted evidence, as well before either House of Parliament, as also before any committee thereof; and also by and before all Courts, Tribunals, Judges, Justices, Officers, and other persons whomsoever, in like

admissible in evidence to the same *extent and effect as the original. By the recent Bankrupt Act,* any pro- [*264
ceedings appearing to be sealed with the seal of the Bankruptcy Court, or writings purporting to be copies and to be so sealed, are to be admitted in all courts as evidence; and a provision^s is also made that all fiats and proceedings entered of record before 2 & 3 Will. IV., c. 114, or purporting to have been sealed before the commencement of this Act with the seal of the Court of Bankruptcy theretofore in use, or a writing purporting to be a copy of any such document and to have been so sealed, and in the case of any fiat and proceedings entered of record before the passing of the last-mentioned Act, with the certificate thereon

manner, and to the same extent and effect as the original enrolment, record, document, or writing, could or might be admissible or admitted in evidence, as well for the purpose of proving the contents of such enrolment, record, document, or writing, and the drawing, map, or plan (if any) thereunto annexed, as also proving such enrolment, record, document, or writing to be an enrolment, record, document, or writing, of, or belonging to the said Court of Chancery, and that such enrolment, record, document, or writing was made, acknowledged, prepared, filed, or entered on the day and at the time when the original record, document, or writing, shall purport to have been made, acknowledged, prepared, filed, or entered."

* 12 & 13 Vict. c. 106, s. 236, which provides, "That any fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition, or other proceeding or order in bankruptcy, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place, or been made, and be deemed respectively records of the court, without further proof thereof; and no such document or copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise provided by this Act."

* Section 236. "Provided always, that all fiats and proceedings under the same which may have been entered of record before the passing of the Act (2 & 3 Will. IV. c. 114), or purporting to have been sealed before 11th October, 1849, with the seal of the Court of Bankruptcy theretofore in use, or a writing purporting to be a copy of any such document, and purporting to have been so sealed, shall and may, upon the production thereof, and in the case of any fiat or proceedings so entered of record before the passing of the last-mentioned Act, with the certificate thereon purporting to be signed by the person duly authorized to enter proceedings in bankruptcy, or his deputy, be received as evidence of the same, and of the same having been duly entered of record, and of such proceedings having respectively taken place."

*265] purporting to be *signed by the person duly authorized to enter proceedings in bankruptcy, or by his deputy, shall be received as evidence. By the Insolvent Debtor's Act, also,[†] copies of the petition and other proceedings purporting to be certified by the officer in whose custody they are, or his deputy, and to be sealed with the seal of the court, are rendered sufficient evidence; and a somewhat similar provision is contained in the County Court Act.[‡]

Thirdly, Sworn copies. Not only records, but all public documents which cannot be removed from one place to another, may be proved by means of a copy proved on oath to have been examined with the original. This is to be considered as a deviation from the general rule, that the best evidence must always be produced, for the sake of public convenience. All judicial proceedings, whether in British or foreign courts,[§] may be proved by means

[†] 1 & 2 Vict. c. 110, s. 105. "That a copy of such petition, vesting order, schedule, order of adjudication, and other orders and proceedings purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other proceeding, and purporting to be sealed with the seal of the court, shall at all times be admitted in all courts and places whatever as sufficient evidence of the same, without any other proof whatever given of the same."

[‡] 9 & 10 Vict. c. 95, s. 111, enacts, "That the clerk of every court holden under this Act shall cause a note of all plaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book, or a copy thereof, bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding without any further proof."

[§] *Appleton v. Lord Braybrooke*, 2 Stark. C. 6; E. C. L. R. 3; 6 M. & S. 34. In an action on judgments recovered in the Supreme Court of Jamaica, the plaintiff produced merely paper writings, purporting to be copies of the judgments, subscribed "true copy," and signed "*F. S.*, clerk;" to which were annexed several certificates: first, of *F. S.* under his hand and seal of office, certifying that the above were true copies of the original judgments of record in his office, and that the same were still unsatisfied; secondly, a certificate of *R. R.*, described as secretary and notary public, certifying that *F. S.* was an accredited clerk, &c.; the third from the Governor-General, under the seal of the island, certifying that *R. R.* was secretary, &c., and that to all acts, &c., signed by him, credit was to be given; the evidence was held to be insufficient, without proving the copies to have been actually examined; the seal of the island not being affixed to the copy to give it the force of an exemplification, but only to authenticate the person certify-

*of a sworn copy, although it be not an office copy;^a and whether the court be a court of record^b or otherwise. The [*266 proceedings by English bill in Chancery are not records, and may themselves be given in evidence,^c or may be proved by means of examined copies.^{d1}

But upon an indictment for perjury. assigned upon an answer in Chancery, the original must, it has been said, be produced.^e And also, where a voluntary affidavit has been made by a party, which has no relation to a proceeding in a court of justice, to make it evidence against the party the original must be produced. Where a will *remains in Chancery, by order of the Court, a copy of it is evidence, because it becomes a roll of the [*267 court.^f

The copy must be one of a complete record, for until it becomes a permanent record it is transferable, and the reason for admit-

ing to be a person to whom credit was to be given. So, where the copy was proved to be in the handwriting of one who acted and signed official documents for the principal clerk: *Ibid.*

^a *Denn v. Fulford*, Burr. 1177; Hard. 119; Gilb. Law of Ev. 9; 16 East, 334. So a grant of a peerage may be proved by an examined copy of the record of the patent; *Lord Lanesborough's case*, 1 H. of L. Ca. 510.

^b B. N. P. 226.

^c Bac. Ab. Ev. F.

^d Bac. Ab. Ev. F.; 3 Mod. 116.

^e *Ibid.*; B. N. P. 238: for the identity of the defendant must be proved; but *quære*, whether this might not be established by admissions or otherwise; see *James's case*, Carth. 220; *Hanwell v. Lyon*, 1 B. & A. 182; Ry. & M. 169; E. C. L. R. 21; *Mortimer v. McCallan*, 6 M. & W. 58; *Sayer v. Glossop*, 2 Ex. 409.

^f *Chambers v. Robinson*, Trin. 12 Geo. I.; B. N. P. 238; Bac. Ab. Ev. F. Examined copies of other affidavits are admissible; *James's case*, Carth. 220; *Doe v. Wood*, Mann. Index 122; *Rees v. Bowen*, M'L. & Y. 383; and *ante*, p. 227, note (f); unless, perhaps, on an indictment for perjury; *Crook v. Dowling*, 3 Dougl. 75; E. C. L. R. 26.

¹ Keb. 117; Gilb. Law of Ev. 67; Bac. Ab. Ev. F.; and see 12 Cl. & F. 304.

¹ The proceedings in civil suits before justices of the peace are within the rule of public books and sworn copies are evidence; *Welsh v. Crawford*, 14 Serg. & Rawle, 440. I.

Hibbs v. Blair, 2 Harris, 413; *Hughes v. Jones*, 2 Maryland Ch. 178; *Jones v. Davis*, 2 Alabama, 730. The Bank of the State of Alabama and its branches, being public property, its books are public writings; and where the books themselves would be evidence, if produced, sworn copies are admissible in evidence; *Crawford v. Branch Bank at Mobile*, 8 Alabama, 79. Sworn copies of written instruments are admissible when the originals are beyond the jurisdiction of the court; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Missouri, 421.

ting a copy to be evidence does not apply.^h Consequently a sworn copy of a judgment in paper, although signed by the Master, upon which judgment might be taken out, is not admissible.ⁱ And to prove an interlocutory and final judgment and execution, an examined copy of the roll carried in must be proved; it is not sufficient to produce entries in the prothonotary's book, and the inquisition, with the prothonotary's allocatur.^k And, in general, a mere minute book of proceedings from which the record is subsequently to be made up is not admissible in evidence.^l But where the record cannot regularly have been completed, as where the *postea* cannot have been entered by reason of a motion for a new trial,^m or where the object is merely to prove that some judicial proceeding has been had, without respect to any ulterior step in that proceeding, the record need not be made up.ⁿ

*268] It is otherwise as to a matter which occurred before the *same court sitting under the same commission. Upon the trial of *Horne Tooke* the minutes of the court were produced to prove the acquittal of *Hardy*.^o

The copy should be of the whole record, or of so much at least as concerns the matter in question,^p and moreover it should be an

^h *Bac. Ab. Ev. F.*; *B. N. P.* 228; *Ayrey v. Davenport*, 2 *N. R.* 474; *Cooke v. Maxwell*, 2 *Stark.* 183; *E. C. L. R.* 3; *R. v. Thring*, 5 *Car. & P.* 507; *E. C. L. R.* 24.

ⁱ *Ibid.* So, to prove a bill of indictment to have been found, it is necessary to show a record with a complete caption; *R. v. Smith*, 8 *B. & C.* 341; *E. C. L. R.* 15. And see *Porter v. Cooper*, 1 *C. M. & R.* 388.

^k *Godefroy v. Jay*, 3 *C. & P.* 192; *E. C. L. R.* 14. The day-book kept at the office is not evidence of the date of signing judgment; *Lee v. Meacock*, 5 *Esp. C.* 177.

^l *R. v. Smith*, 8 *B. & C.* 341; *E. C. L. R.* 15; *Porter v. Cooper*, 6 *C. & P.* 354; *E. C. L. R.* 25; *R. v. Bellamy*, *Ry. & M.* 171; *E. C. L. R.* 21; *R. v. Birch*, 3 *Q. B.* 431; *E. C. L. R.* 43. Thus the minute-book of the Court of Quarter Sessions is not evidence as to the trial of an indictment; *R. v. Thring*, 5 *Car. & P.* 507; *E. C. L. R.* 24. Or an appeal, *R. v. Ward*, 6 *C. & P.* 366; *E. C. L. R.* 25; unless in the latter case it be the only record; *R. v. Feoveley*, 8 *Ad. & E.* 806; *E. C. L. R.* 35; *Reg. v. Mortlock*, 7 *Q. B.* 459; *E. C. L. R.* 53.

^m *R. v. Browne*, 3 *C. & P.* 572; *E. C. L. R.* 14.

ⁿ *B. N. P.* 234; *Pitton v. Walter*, 1 *Str.* 162; *Fisher v. Kitchingman*, *Willes*, 367; *R. v. Gordon*, *Car. & M.* 410; *E. C. L. R.* 41.

^o *How. St. Tr.* vol. xxv., p. 446.

^p *Tri. P. P.* 166; 3 *Inst.* 173; *Reg. v. Baynes*, 1 *Car. & K.* 70; *E. C. L. R.* 47; *Blower v. Hollis*, 1 *C. & M.* 396; *Leake v. Marquis of Westmeath*, 2 *M. & Rob.* 397; *Attwood v. Taylor*, 1 *M. & G.* 289; *E. C. L. R.* 39.

exact copy, and therefore if it contain abbreviations, and the original be written in words at length, it will be inadmissible.^a

A book published by authority in a foreign country, as a regular copy of treaties concluded by the State, is not evidence without proving it to have been compared with the original archives.^f

It is a general rule, that whenever the original is of a public nature, a sworn copy is admissible in evidence. And that whenever the thing to be proved would require no collateral proof upon its production, it is proveable by a copy.^g But where the document when produced would require support from collateral proof, it has been thought that a copy of it is not admissible, and therefore, where an application was made that an original examination before a magistrate might be produced upon the trial of a cause, it was ordered before the examination, if produced, would not in itself be evidence, without proof of the handwriting of the party.^h But an examined copy of an entry in the bank books, and evidence by a person who *had inspected the entry in them, that the handwriting of the acceptance of a transfer of stock was that [*269 of the defendant, was held admissible to prove the acceptance of the stock by him, and his identity, without producing the books themselves.ⁱ

Sworn copies of the following documents have been received in evidence:—

Of a bank-note filed at the Bank.*

Of the transfer-books of the Bank of England.^j

^a *Reg. v. Christian*, Car. & M. 388; E. C. L. R. 41. Upon an indictment for perjury on an affidavit in a cause in Chancery, a witness produced an office copy of the bill, containing abbreviations, for instance, "possd of considble perl este," and all the dates in figures; he stated that it was a copy, but that in the original the words and figures were at length. Lord Denman, C. J., held that the copy in this respect being unlike the original was not admissible.

^f *Richardson v. Anderson*, 1 Camp. 65.

^g *Hoe v. Nathorp*, Lord Raym. 154; *Lynch v. Clerke*, 3 Salk. 153.

^h *R. v. Smith*, Str. 126.

ⁱ *Mortimer v. McCallan*, 6 M. & W. 58; and see *ante*, pp. 227, note (f), 266, note (e).

^j *Man v. Cary*, 3 Salk. 155; 12 Vin. Ab. 97, 99.

^k *Mortimer v. McCallan*, 6 M. & W. 58. Before this case it had been held that to prove a transfer of stock, a copy from the Bank books must be produced; the testimony of the broker who effected the transfer is insufficient; *Breton v. Cope*, *Executors*, Peake, 43; and see Douglas, 593, n. Such copies, when proved to be so, are direct evidence; and the court, for the sake of example, would not allow the books themselves to be read: *Marsh v. Collnet*, 2 Esp. 665.

Of transfer-books of the East India Company.^z

Of the books of the City of London.^a

Of court-rolls under the hand of the steward.^b

Of the journals of both Houses of Parliament.^c

Of the minute-books of the House of Lords.^d

Of an agreement, from a book in the Bodleian Library, from which books cannot be removed.^e

Of the probate of a will relating to personalty.^f

Of a parish-register.^g

*270] Of a poll-book at an election.^h

*Of a public book in one of the universities.ⁱ

Of entries in the council-book in the Secretary of State's Office.^k

Of the enrolment-book, in which leases are registered in the Bishopric of Durham.^l

Of documents in the nature of muniments of title of the Crown, deposited in the office of her Majesty's Land Revenue Records and Enrolments, pursuant to stat. 2 Will. IV., c. 1.^m

Of books of the commissioners of excise.ⁿ

Of books of assessments by the commissioners of land tax.^o

Although, for the sake of public convenience, the copy of a

^z Doug. 593; 1 Str. 646.

^a 2 Str. 954, 955.

^b Doug. 593, 163; 12 Mod. 24.

^c Doug. 593; Cowp. 17; Str. 126. By 8 & 9 Vict. c. 113, s. 3, copies of the Journals, purporting to be printed by the printers to the Queen or either House of Parliament, are made evidence.

^d 1 Cowp. 17.

^e Bun. 191; *Downes v. Moreman*, 2 Gwill. 659; this, however, was considered as an indulgence under the particular circumstances of the case.

^f 3 Salk. 154; *Hoe v. Nathorp*, 1 Ld. Raym. 154.

^g *Man v. Cary*, 3 Salk. 154; Str. 1073, *S. C.*

^h *Mead v. Robinson*, Willes, 422.

ⁱ *Semble*, 8 T. R. 307.

^k *Eyre v. Palsgrave*, 2 Camp. 606.

^l *Humble v. Hunt*, Holt's C. 601; E. C. L. R. 3.

^m *Doe dem. King William IV. v. Roberts*, 13 M. & W. 520. And a copy of an extract from a rental of the Earl of Leicester, who once held the lands in question, whose estate had come back to the Crown, found there, was held evidence for the same reason; the original being evidence as charging the receiver; *Ibid.* So, expired leases of Crown lands, deposited in the same office, which ought to have been enrolled under 10 Geo. IV. c. 50, s. 63, may be proved (as evidencing acts of ownership) by examined copies, although they may not have been enrolled under that Act; *Ibid.* And *semble*, where original documents would be evidence, and they are kept among the muniments of the Crown as evidences of its title, copies are evidence; *Ibid.*

ⁿ *Fuller v. Fotch*, Carth. 346.

^o *Rex v. King*, 2 T. R. 234.

public document is admitted in evidence as an original, a copy of a copy is of no weight whatsoever, since it is one step farther removed from the original.^p

The copy must be proved by one who swears that he has compared it with the original,^q taken from the proper place of deposit. It was formerly thought sufficient for this purpose, either that the witness should have read the *copy whilst another read the original, or *vice versâ*,^r for it would not be presumed that a [271 person wilfully misread the record; but it has since been determined that it is not sufficient that the witness holds the copy while another reads the record: there must be a change of hands, or the witness must himself read the copy with the original.^s It is not necessary, however, that the record should have been read by the officer of the court.^t Before a document can be read as a copy of a record, it must be proved that the original either came out of the hands of the officer of the court, or from the proper place of depositing the records of the court of which it purports to be a record, and the contents of the document itself cannot be referred to in support of such proof.^u The copy must be an accurate and complete one, not having abbreviations where words were written at length in the original.^x

And now in order to facilitate the proof of such document, it has been enacted^y "that whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible as evidence in any court, &c., provided it be proved to be an examined copy

^p Gilb. Law of Ev. 7.

^q Bac. Ab. Ev. F.; Str. 401; 2 Keb. 31, 546; 3 Keb. 1, 2; 10 Co. 92.

^r *Rolf v. Dart*, 2 Taunt. 52; *McNeil v. Perchard*, 1 Esp. 264; *Gyles v. Hill*, 1 Camp. 471; *Fyson v. Kemp*, 6 Car. & P. 72; E. C. L. R. 25; *Reid v. Margison*, 1 Camp. 469.

^s *Slane Peerage*, 5 Cl. & F. 24; *Harrison v. Borwell*, 10 Sim. 380.

^t *Gyles v. Hill*, 1 Camp. 471.

^u *Adamthwaite v. Singe*, 1 Stark. C. 183; E. C. L. R. 2; 4 Camp. 372. In order to prove a copy of an Irish judgment, it was held to be insufficient for the witness to prove that he compared the writing with a record produced to him in a room over the Four Courts, where the records of the superior courts are kept, without seeing whence the record was taken, or knowing the person who produced it to be an officer of the court.

^x *R. v. Christian*, Car. & M. 388; E. C. L. R. 41; *ante*, p. 268, note (q).

^y 14 & 15 Vict. c. 99, s. 14.

or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted."

*272] *A copy is never admissible where the original is produced.* A copy of an entry in a *customal*, being offered in evidence against a corporation, was rejected on production of the original.

Where a record has been lost, a copy may in some instances be read in evidence without proof upon oath that it is a true copy.^a But to warrant such evidence the document must be according to the rule of the civil law, *vetustate temporis aut judiciarum cognitione roborata*.^b A copy of a decree of tithes has, it is said, been often given in evidence in London, without proving it to be a true copy, the original having been lost.^c So the exemplification of a recovery of lands in ancient demesne, where the original was lost, and possession had gone a long time with the recovery, was admitted in evidence.^d So, where it appeared that the records of the city of Bristol had been burned, an exemplification of a recovery, under the town seal, of houses in Bristol, was allowed in evidence.^e

Upon an ejectment brought for the recovery of a rectory, to which a recusant had presented, it was held, that the record of the conviction, which had been burned, might be proved by estreats in the Exchequer,^f and an inquisition of the recusant's lands returned there. So, in trover, if *fieri facias* or *venditioni exponas* be lost,^g other evidence is admissible; so, also, if a recovery in ancient demesne be lost, and the roll cannot be found, it may be proved by the oral testimony of witnesses, where the possession has gone accordingly.^h So, where the question of appropriation

^a 21 How. St. Tr. app. 650.

^b Vent. 257; 1 Mod. 117; Salk. 285; Gilb. Law of Ev. 18; Bac. Ab. Ev. F.

^c Dig. 292; 1 Mod. 117.

^d 1 Vent. 257; B. N. P. 228; see *Macdougall v. Young*, Ry. & M. 392; E. C. L. R. 21.

^e *Green v. Proude*, 1 Mod. 117.

^f 1 Mod. 117.

^g *Knight v. Dawler*, Hard. 323; 1 Salk. 285.

^h Hard. 323; Al. 18.

ⁱ 1 Vent. 257; 2 Str. 1129; 2 Burr. 1072; 4 T. R. 514.

¹ So parol evidence was admitted to prove that a *ca. sa.* issued, and that the sheriff returned on it "not found," the *ca. sa.* having been lost or mislaid; *Jones v. Walker*, 2 Hayw. 291; see also *Buchanan v. Moore*, 10 Serg. & R. 275. G.

And where a *fieri facias* after it had been levied, was accidentally burnt in the officer's house, the court directed a new one to be made out and delivered to him; *White v. Lovejoy*, 3 Johns. 448; see 1 Phill. Ev. 310, 3rd ed. M.

is in issue, and the king's license has been lost, the issue may be proved by other evidence.¹¹

Documents of a public nature, and of public authority, [*273
*are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the parties on whose authority the truth of the document depends. The extraordinary degree of confidence thus reposed in such documents is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate, and in some instances upon their antiquity. Where particular facts are inquired into, and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials, are in fact the agents of all the individuals who compose the public; and

¹ Hard. 323.

¹ Facts which may have become matter of record, may be proved by secondary evidence, after proof is given of the existence and loss of the record; *Dillingham v. Snow, et al.*, 5 Mass. Rep. 547; *Stockbridge v. West Stockbridge*, 11 Id. 490; see Swift's Ev. 3.

The certificate of a clerk, stating the loss of the record, is not evidence of the fact; it must be proved by oath; *Wilcox v. Ray*, 1 Hayw. 410; *Robinson v. Clifford*, C. C. April, 1807, MS. Wharton's Digest, 224. (Reported, 2 Wash. C. C. Rep. 1.) But where it is proved that most of the records of a clerk's office have been burnt, and the rest mutilated, the journals of the court are evidence; *Cook v. Wood*, 1 McCord, 139; *Lyons v. Gregory*, 3 Hen. & Munf. 237, S. P. Parol evidence, however, of a conviction for felony was held inadmissible, in New York, though it was proved that the clerk's office had been burnt, it being the duty of the District Attorney to deliver a transcript into the Court of Exchequer, which duty he must be presumed to have performed, and thus have furnished evidence of a higher order; *Hilts v. Colvin*, 14 Johns. 682. M.

The docket entry, upon proof of the loss of the other part of the record, is competent evidence; and parol proof may be given of the contents of that part of the record which is lost; *Harvey v. Thomas*, 10 Watts, 63; see also *Heirs of Ludlow v. Johnston*, 3 Ohio Rep. 569. G.

As to oral evidence of lost records see *Ravenscroft v. Gibony*, 2 Missouri, 1; *Ludlow v. Johnston*, 3 Hammond, 553; *Pruden v. Alden*, 23 Pick. 184; *Fowler v. More*, 4 Pike, 570; *Nelson v. Boynton*, 3 Metcalf, 396; *Bogart v. Green*, 8 Missouri, 115; *Stewart v. Conner*, 9 Alabama, 803; *Baskin v. Seechrist*, 6 Barr, 154; *Eakin v. Vance*, 10 Smedes & Marshall, 549; *Wing v. Abbott*, 28 Maine, 367; *Weatherhead v. Baskerville*, 11 Howard S. C. Rep. 329; *James v. Biscoe*, 5 English, 184; *Small v. Pennell*, 31 Maine, 267; *Millard v. Hall*, 24 Alabama, 209.

every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to the agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not requisite that they should be confirmed and sanctioned by the ordinary tests of truth; in addition to this, it would not only be difficult, but often utterly impossible, to prove facts of a public nature by means of actual witnesses examined upon oath; such, for example, as the passing of particular Acts of Parliament, and the making of public surveys.^k

The Acts of the Legislature are records written on the rolls of Parliament,^l and are of the highest and most *absolute *274] proof. They are either *public* or *private*. They are public or general Acts when they do or may concern the kingdom at large; they are private when they relate to a particular class of men, or to individuals only: of the former class, are Acts which concern the king, all lords of manors, all officers generally, all spiritual persons, or all traders;^m of the latter, are Acts relating to the nobility only, or to particular persons or traders.ⁿ

A *public* statute requires no proof; and where it is necessary to refer to one, a copy is not given in evidence, but merely referred to, to refresh the memory.^o Where a statute is not in express

^k See further as to the principles on which public documents are admissible, *supra*, p. 260; and see *Slane Peerage*, 5 Cl. & F. 24, *post*.

^l See Preface to the Statutes, by the Commissioners of Public Records. The original of a public Act of Parliament is kept in the Parliament Office, and a transcript is engrossed and certified by a clerk in Parliament, and deposited in the Rolls Chapel. Private Acts are filed and labelled, and remain with the clerk of the Parliament, and are not, (except a few of the earlier) deposited in the Rolls Chapel.

^m It seems that the distinction between public and private Acts was not observed before the reign of Richard III. See Preface to the new edition of the Statutes at Large.

ⁿ If a private statute be recognised by a public Act, it will afterwards be judicially noticed; as the Statute of Bailbonds, 23 Hen. VI. c. 9; which, at all events, became a public statute when the statute 4 & 5 Anne, c. 16, s. 20, made the bond assignable; *Samuel v. Evans*, 2 T. R. 575; *Saxby v. Kirkus*, B. N. P. 224.

^o A printed statute book is evidence of a public statute, not as an authentic copy of the record itself, but as hints of that which is supposed to be lodged in every man's mind already; Gilb. Law of Ev. 12; 2 Salk. 566; 10 Mod. 126; Bac. Ab. Ev. F. The Courts take notice of all public Acts of Parliament, and it is unnecessary to plead them; but private Acts must be specially pleaded; B. N. P. 222; *Lord Bernard v. Saul*, 1 Str. 498; Ld. Raym. 119. But although public Acts will be noticed by the court when the party insists upon them by way of

terms made a public statute, it is still such with a view to evidence, if it be of a general and public nature, affecting all the king's subjects; and therefore it has been ruled at the assizes, that a statute, *as far as it related to a public highway, was to be considered as a public statute.^p So it is said that the Act of Bedford Levels, and that for rebuilding Tiverton, are, from the publicity of the subject-matter, public Acts; and that a printed copy might, before the recent Act, have been given in evidence.^q On the other hand, an Act of Parliament, private in its nature, is not made admissible in evidence against strangers, by the general clause declaring it a public Act, which only applies to the forms of pleading and evidence, and does not vary the general nature and operation of the Act.^r A power in an Act *to levy [*275
[*276]

defence, the defence itself, when depending on a statute, must be pleaded as much as when it depends upon the common law. As, where a defendant means to insist upon the Statute of Limitations, or the Statute of Usury, unless he plead the defence specially, he cannot rely upon the Statute of Limitations in evidence under the plea of *non assumpsit*, nor upon the Statute of Usury upon the plea of *non est factum* to a declaration upon a bond; B. N. P. 224. See tit. DEBT—DEED—PENAL ACTION—USURY—HIGHWAY.

^p By Chambre, J., MS. C. But a private Act that concerned Rochester Bridge, though printed by Rastell, was not allowed in evidence; Law of Ev. 82, pl. 14, *tam qu.* A private inclosure Act, containing clauses respecting public highways, is, as to those clauses, a public Act; *R. v. Utterby*, Lincoln Spring Ass. 1828. Lord C. B. Parker permitted the printed statute concerning the College of Physicians to be read from the printed statute book, printed by the King's printer; Gilb. Law of Ev. 10, 13; see further, Bac. Ab. St. L. A very learned opinion given by Mr. J. Holroyd, when at the bar, that an Act of Parliament, although in other respects private, is, as regards a public highway to which it refers, to be considered a public Act, has in many instances been acted upon by magistrates at the sessions. In a late case, *R. v. Stonebeckup*, York Summer Ass. 1839, on an indictment for obstructing a public way, Maule, B., received an award under a local inclosure Act, in evidence, so far as regarded a public highway, set out under the award. Where a map of a parish was made under an inclosure Act, which was a private Act and not printed, it was not received in evidence on an indictment for non-repair of a highway, to show the boundaries of the parish in the absence of proof of the Act, although brought from the parish chest; *Reg v. Inhabitants of Milton*, 1 Car. & K. 58; E. C. L. R. 47. If counsel produce an Act, local in its nature, stating that it is to be judicially noticed, the Judge will do so without requiring a copy printed by the Queen's printer; *Forman v. Dawes*, Car. & M. 127; E. C. L. R. 41.

^q B. N. P. 225; *per* Holt, C. J., 12 Mod. 216; see Pothier by Evans, vol. ii., p. 152.

^r Such a clause does not make it notice to all the world of its contents, *Ballard v. Way*, 1 M. & W. 520; nor evidence against them as to recitals or statements

tolls on all persons using a particular navigation, is not sufficient to make it a public Act as against strangers.^a

By the statute 41 Geo. III., c. 90, s. 9, copies of the statutes of Great Britain and Ireland prior to the Union, printed by the printer duly authorized, shall be received (mutually) as conclusive evidence of the several statutes in the courts of either kingdom.

Where an Act of Parliament is of a *private* nature, proof of it is necessary; for although every man is bound to take notice of all Acts which concern the kingdom at large, he is not presumed to be cognizant of those which merely concern the private rights of another.¹ The usual proof formerly was by means of a copy proved upon oath to have been examined with the Parliament roll,^u or it might also be proved by means of an exemplification under the great seal.^x And a private Act, if it be thought advisable, may still be proved in this way. In some cases, however, to

therein, *Beaumont v. Mountain*, 10 Bing. 404; E. C. L. R. 25; *Duke of Beaufort v. Smith*, 4 Ex. 450; *Brett v. Beales*, M. & M. 421; E. C. L. R. 22; and this must be taken to be the effect of the decision in the latter case. See *Beaumont v. Mountain* and *Woodward v. Cotton*, *infra*. It still remains a private or local and personal act; *Cock v. Gent*, 12 M. & W. 234; and see *Richards v. Easto*, 15 M. & W. 242.

^a *Brett v. Beales*, M. & M. 421; E. C. L. R. 22.

^u Bac. Ab. Ev. F.; Gilb. Law of Ev. 13. See the case of *The College of Physicians v. West*, 10 Mod. 353.

^u In order to show that a private Act, which was not upon the roll, had been passed, a document was produced by a clerk of the House of Lords, headed "Long Calendar of Acts passed from 12 Hen. VII. to 33 Geo. II.," containing the title of the Act in question, the earlier part of this appeared to have been compiled in 1640, and it was proved to have been the practice to enter upon the Long Calendar Acts of Parliament as soon as they had received the royal assent, but not before; the Court, however, seemed to think that this was no evidence that the Act had been passed; *Doe dem. Bacon v. Brydges*, 6 M. & G. 282; E. C. L. R. 46.

^x See tit. EXEMPLIFICATION.

¹ To constitute a statute a public Act, it is not necessary that it should be equally applicable to all parts of the State. It is sufficient if it extends to all persons within the territorial limits described in the statute; *Pierce v. Kimball*, 9 Greenl. 54. If a statute contains provisions of a private nature, as to incorporate a bank, &c., yet if it contains also provisions for the forfeiture of penalties to the State, or for the punishment of public offences in relation to such bank, it is a public statute; *Roger's case*, 2 Greenl. 303; *Crawford v. Bank*, 6 Alabama, 289. Acts prescribing the limits of counties and towns are public Acts, of which the courts are bound judicially to take notice; *Commonwealth v. Springfield*, 7 Mass. 9; *New Portland v. New Vineyard*, 4 Shep. 69; *Gorham v. Springfield*, 8 Ib. 58; *Stephenson v. Doe*, 8 Blackford, 508.

facilitate proof, it was directed that a copy printed by the king's printer should be admitted in evidence; and then the production of a copy purporting to have been so printed was sufficient.^y Such proof having been found *extremely convenient and safe in practice, a general provision has been made by the Legislature, which has enacted "that all copies of private and local and personal Acts of Parliament, not public Acts, if purporting to be printed by the queen's printers, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."^z [*277

Where the printed copy of an Act is incorrect, the court will be guided by the Parliament roll.^{a1}

Where a party appealed against an act done by another under a private statute, it was held that the appellant was not bound to prove an examined copy of the roll, and that a printed copy was sufficient.^b

But in many cases Acts of a private nature contain a clause declaring that they shall be deemed to be public Acts, and requiring them to be judicially noticed; in such cases it is unnecessary to prove an examined or other copy.^{c2} And in order further to

^y Upon *nul tiel record*, pleaded to the Composition Act, Holt, C. J., held, that a copy printed by the King's printer was not sufficient, and that an exemplification was necessary; but said, that an Act printed by the King's printer was always good evidence before a jury; *Anon.* 2 Salk. 566. Where an indictment set out the title of an old statute (5 Eliz. cap. 4), agreeably to Ruffhead, which differed from a copy of the Act lately printed by the King's printer, the court refused to direct an acquittal without proof of an examination of the Parliament roll; *Rex v. Barnett*, 3 Camp. 344; see *R. v. Jefferies*, 1 Str. 446.

^z 8 & 9 Vict. c. 113, s. 3. By s. 4, if any person shall print any copy of any private Act, which copy shall falsely purport to have been printed by the printers of the Crown, or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and be liable to transportation or imprisonment, and such document may be impounded.

^a See *R. v. Jefferies*, 1 Str. 446; *Spring v. Eve*, 2 Mod. 240; *Price v. Hollis*, 1 M. & S. 106.

^b *R. v. Shaw*, 12 East, 479.

^c *Beaumont v. Mountain*, 10 Bing. 404; E. C. L. R. 25; *Woodward v. Cotton*, 1 C. M. & R. 44.

¹ A printed statute may be corrected by the enrolled bill filed in the department of State; *Reed v. Clarke*, 3 McLean, 480.

² In Massachusetts, all Acts incorporating manufacturing companies are, by stat, 1808, c. 65, § 7, made public Acts, and as such may be declared upon and

dispense with proof, every Act made after January 1st, 1850. is directed to *be deemed a public Act, and judicially noticed *278] as such, unless the contrary be declared.^d

The recital in the preamble of a public Act of Parliament of a public fact, is evidence to prove the existence of that fact. Where an information for a libel alleged that outrages had been committed in particular parts of the kingdom, the preamble of a public Act reciting the fact was held to be admissible evidence to support the averment; for every subject is, in contemplation of law, privy to the making of such an Act.^e

But such a recital in a private Act, even though it contain a clause declaring that it shall be taken to be a public Act, and judicially taken notice of as such, is not evidence, generally speaking, to prove the facts as against strangers.^f But as against persons who were parties, or claim through them, such a recital will be evidence. It may likewise be evidence of reputation; thus upon a question as to the right of free warren over an entire manor, with respect to which reputation is admissible evidence, a private Act for inclosure of common lands within the manor, in the recital of which the interest of copyholders appeared, and which Act contained a proviso saving the right of the lord to free warren within the manor in as ample a manner as the lord had theretofore

^d 13 & 14 Vict. c. 21.

^e *R. v. Sutton*, 4 M. & S. 532; and see *R. v. De Berenger*, 3 M. & S. 67.

^f *Brett v. Beales*, M. & M. 421; E. C. L. R. 22; *Beaumont v. Mountain*, 1, Bing. 404; E. C. L. R. 25; *Duke of Beaufort v. Smith*, 4 Ex. 450.

given in evidence, without specially pleading them. In the same State and also in Virginia and Pennsylvania a copy of private statutes, printed by order of the Legislature, is admitted in evidence without any further proof; St. of Mass. 1805 c. 36; *Young v. Bank of Alexander*, 4 Cranch, 388; *Biddis v. James*, 6 Binney, 321. And in Virginia private statutes may be given in evidence without being specially pleaded; yet they must be exhibited to the court as documents, and are not to be noticed judicially as public statutes are; *Legrand v. Hampden Sidney College*, 5 Munf. 324. In New York, the printed statute book is not evidence of a private Act, but it seems that the rule does not apply to the case of a private statute given in evidence by the opposite party, against the party for whose benefit the Act was passed; *Duncan v. Dubois*, 3 Johns. Cas. 125.

That courts do not take judicial notice of private statutes, but that they must be proved, like other facts; see also *Portsmouth Livery Co. v. Watson*, et al., 10 Mass. Rep. 91; *Pearl v. Allen*. 2 Tyler's Rep. 311. M.

If a statute of a private nature, containing a clause declaring it a public Act, it will be noticed by the courts as a public Act; *The Brookville Ins. Co. v. Records*, 5 Blackford, 170.

enjoyed it, was held to be evidence to prove the right against a copyholder.^s And a private Act of Parliament, enabling the family of *Kemeys* to sell certain estates, and describing in its recitals the relationship of certain members of the family, was held very strong proof of that relation, so as to establish part of a pedigree.^h¹

*Acts of state may be proved by a production of the official printed document authorized by government. The [279 Gazetteⁱ is evidence of all acts of State, and of everything done by the King in his regal capacity; so as to prove an averment that divers addresses had been presented to the King;^k for having been received by the King in his public capacity, they become acts of State. So the Gazette is evidence to prove the King's proclamation, as for performance of quarantine. So the printed proclamation of peace is evidence, without examination with the Parliament roll.^l The proclamation for reprisals in the Gazette is evidence of an existing war.^m

^s *Earl of Carnarvon v. Villebois*, 13 M. & W. 313.

^h *Wharton Peerage*, 12 Cl. & F. 295.

ⁱ A gazette purporting to be printed by the King's printer, must be taken to be the London Gazette; *R. v. Holt*, 5 T. R. 439.

^k *R. v. Holt*, 5 T. R. 436. The Queen's proclamation is not noticed by the court without the production of the Gazette; *Van Omeron v. Dowick*, 2 Camp. 44; 12 Vin. Ab. 129; *Dupays v. Shepherd*, 12 Mod. 216; or a copy of the proclamation, purporting to be printed by the Queen's printer, which is declared to be sufficient evidence; 8 & 9 Vict. c. 113, s. 3. In a prosecution for murder, the articles of war ought to be produced to show how far the prisoner was bound to obedience to the deceased, who was his sergeant; *Dupays v. Shepherd*. In the case of the *Attorney-Gen. v. Theakstone*, 8 Price, 89, it was held that the Gazette was sufficient evidence of a proclamation issued by the council, because it is a public Act regarding the Crown and the government, and must pass the great seal before it can be admitted into the Gazette. In *General Picton's case*, 30 How St. Tr. 225, the Gazette was admitted to prove the articles of capitulation for the surrender of an island.

^l Bac. Ab. Ev. F.; Doug. 594, in n.; B. N. P. 226; *Queech's case*, 14 How. St. Tr. 1067.

^m *R. v. Holt*, 5 T. R. 443. Public notoriety is, it is said, sufficient evidence of the existence of a war; Fost. C. L. 219; see *R. v. De Berenger*, 3 M. & S. 67; and 11 Ves. 292. And a declaration of war by a foreign government, transmitted by the English ambassador, and produced from the secretary of state's office, is evidence of the commencement of war with a foreign state; *Thellusson v. Cosling*,

¹The recitals in the preamble of a private statute are evidence of the facts recited as between the State and the party for whose benefit the Act is passed, but they are not conclusive; *The State v. Beard*, 1 Smith, 276; *Fred. Female Seminary v. The State*, 9 Gill. 379.

*280] *It seems, however, that knowledge of a fact, although it be of a public nature, is not to be conclusively inferred from a notification in the Gazette;^a it is a question of fact for the jury.

But the Gazette is not evidence to prove a particular military appointment,^o nor to prove particular facts between individuals,^p and therefore it is not evidence in an action to prove the appointment of one of the parties to a commission in the army, unless (at least) the adversary refuse to produce the commission, which is the best evidence;^q nor where it was alleged in a declaration that a parish had been divided into distinct parishes by order of the King in council, under 58 Geo. III., c. 45, could the order be proved by producing the Gazette containing a copy of it.^r But it is evidence, as a medium to prove *notices*; as of the dissolution of a partnership, which is a fact usually notified in that manner.^s But without proof that the party to be affected by the notice read the particular Gazette in which it is contained, such evidence is very weak.^t And it seems to be incumbent on those who dissolve partnership to give special notice of it to those with whom they have had dealings.^{u1} Notices of bankruptcies in the Gazette are made suffi-

4 Esp. C. 266; and see 1 Dodson, Ad. R. 244. Documents transmitted by British consuls, stating the arrival of vessels at particular ports, are not evidence; *Roberts et al. v. Eddington*, 4 Esp. C. 88; and see *Waldron v. Coombe*, 3 Taunt. 162.

^a *Harratt v. Wise*, 9 B. & C. 712; E. C. L. R. 17.

^o *R. v. Gardiner*, 2 Camp. 513.

^p But see *R. v. Sutton*, 4 M. & S. 532; where a proclamation offering a reward for the discovery of certain offenders, which recited that outrages had been committed in certain districts, was admitted as evidence to satisfy an averment in an information for a libel that such outrages had been committed.

^q *Kirwan v. Cockburn*, 5 Esp. 233; S. P., *R. v. Gardner*, 2 Camp. 513.

^r 1 Stark. Ev. 607, 3rd ed.

^s *Leeson v. Holt*, 1 Stark. C. 186; E. C. L. R. 2; *Graham v. Hope*, Peake, C. 154; *Godfrey v. Macauley*, Peake, C. 155, n.; *Gorham v. Thompson*, Peake, C. 42.

^t *Leeson v. Holt*, 1 Stark. C. 186; E. C. L. R. 2; see PARTNERSHIP; and see *Graham v. Hope*, Peake, C. 154; *Munn v. Baker*, 2 Stark. C. 255; E. C. L. R. 3; *Gorham v. Thompson*, Peake, C. 42.

^{u1} 1 Esp. C. 171; *Gorham v. Thompson*, Peake, C. 42; *Jenkins v. Blizzard*, 1 Stark. C. 418; E. C. L. R. 2; *Kirwan v. Kirwan*, 2 Cr. & M. 617.

¹ Notice by advertisement in a newspaper printed at the place where the partnership business was carried on has been held sufficient notice of dissolution as to all persons who had no previous dealings with the firm; *Ketchum v. Clark*, 6 Johns. 144; *Graves v. Merry*, 6 Cowen, 701; *Shaffer v. Snyder*, 7 Serg. & Rawle, 503; *Prentiss v. Sinclair*, 5 Vermont, 149; *Shurlds v. Tilson*, 2 McLean, 458; *Wat-*

cient by express *legislative provisions. It is unnecessary, it is said, to give any evidence to authenticate the Gazette [*281 produced, or show whence it came.²

Acts of State in a foreign country, or British colony, may be proved by copies examined with the original archives, or exemplified under the great seal of that country,³ or by copies purporting to be sealed with the seal of the foreign State or British colony.⁴ Commercial regulations must be proved by copies thereof.⁵

² *R. v. Forsyth*, Russ. & R. 274.

³ *Richardson v. Anderson*, 1 Camp. 65, n.

⁴ 14 & 15 Vict. c. 99, s. 7. "All proclamations, treaties, and other acts of state of any foreign state or of any British colony," may be proved in any court, &c., either by examined copies or copies authenticated, as hereinafter mentioned; that is to say, they "must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs;" "but if any of the aforesaid authenticated copies shall purport to be sealed as hereinbefore directed, the same shall be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal."

⁵ 30 How. St. Tr. 491.

kinson v. Bank, 4 Whart. 482; *Gallicott v. Bank*, 1 M'Mullan, 209; *Mauldin v. Bank*, 2 Alabama, 502; *Simonds v. Strong*, 24 Vermont, 642.

Actual notice however must be given to those who have had such previous dealings; *Wardwell v. Haight*, 2 Barb. Sup. Ct. 549; *Hutchins v. Hudson*, 8 Humph. 426; *Conro v. Iron Co.*, 12 Barbour, 27.

The receipt by a previous dealer with a firm, of a newspaper containing a notice of the dissolution of the partnership, the dealer being a subscriber for the paper, though a circumstance tending to prove notice, is not *per se* sufficient to prove it; *Hutchins v. The Bank*, 8 Humph. 418. To constitute a person a previous dealer, with a firm and entitled to actual notice of the dissolution of the partnership, he must have dealt directly with the firm: it is not sufficient that he may have dealt in paper, for which the firm was responsible. *Ibid.*

¹ By the statute of the United States passed May 26th, 1790, "The Acts of the Legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto."

In conformity with the decisions on the latter clause of this statute, (see ante, p. 259,) it might be anticipated that the courts of the United States would hold that a statute of one State is not admissible in evidence in the courts of another, unless authenticated by the seal of the State in which it is enacted. It has accordingly been held that printed statute books not authenticated by the seal of the State are not admissible evidence in any other State; *Craig v. Brown*, Peter's C. C. Rep. 352. And this decision has been followed in North Carolina; *State v. Twitty*, 2 Hawks, 441. It had been previously held, in that State, that the printed laws of Virginia were good evidence; *Poindexter v. Barker*, 2 Hayw. 173; although a statute, certified by the clerk of the House of Delegates, was ruled not to be evidence; *Ellmore v. Mills*, 1 Hayw. 360. In Pennsylvania, the

So certain things, besides Acts of Parliament, printed or purporting to be printed by the queen's printer are evidence; thus the articles of war so published are evidence of them,^b and copies

^b *R. v. Withers*, 5 T. R. 446. See note (k), *supra*.

courts have admitted in evidence copies of the statutes of other States contained in a book purporting on its face to contain the laws of, and to be printed by the printers of those States; *Thompson v. Musser*, 1 Dallas, 462; *one judge dissenting*; *S. P. Biddis v. James*, 6 Binney, 321; and in one instance such evidence has been rejected; *Commonwealth v. Fraser*, cited 6 Binney, 323. In (Massachusetts and) Vermont the statute laws of any one of the United States, if printed under the authority of such State are admitted in evidence; (*Raynham v. Canton*, 3 Pick. Rep. 293;) *State v. Stade*, 1 Chip. Rep. 303. The court said, in that case, "If such an Act be proved, agreeably to the provisions of the Act of Congress, the courts are *bound* to admit it; they *may* admit it, although not so proved." In Connecticut, a book of the statutes of another State, printed by a *private* printer, is not admissible in evidence; *Bostwick v. Bogardes*, 2 Root, 250.

Where the seal of a State is affixed to an exemplification of an Act of the Legislature, the attestation of a public officer is not required; *United States v. Johns*, 4 Dallas, 413.

Although in strictness, the Acts of the Legislatures of others States are (probably) not admissible in evidence, unless they are authenticated according to the above-mentioned statute of the United States, yet in practice, public statutes published by authority in other States are generally read without objection in the State courts.

The statutes of another State cannot be noticed by courts unless they are pleaded; *Pearsall et al. v. Dwight*, 2 Mass. Rep. 84; *Legg v. Legg*, 8 Ibid. 99; *Walker, et al. v. Maxwell*, 1 Ibid. 104; *Beauchamp v. Mudd*, Hardin's Rep. 165; see also *Tarlton v. Briscoe*, 4 Bibb, 73; *Talbot v. David*, 2 Marsh. 609; where it was decided by the Court of Kentucky, that the laws of a sister State cannot be judicially noticed there, but must be proved. M

The journals of the Senate of New York, printed by the State printer, and laid on the tables of members, are evidence; *Root v. King*, 7 Conn. 613. But the commercial code of France, which is a written law, cannot be proved by the production of a printed book admitted to be conformable to the official edition of the code published by the government; *Chamoine v. Fowler*, 3 Wend. 173; see also *Lincoln v. Battelle*, 6 Wend. 475; *Harford v. Nichols*, 1 Paige, 220. G.

Printed statute book of laws of sister State are admissible; *Thomas v. Davis*, 7 B. Mon. 227; *Burton v. Anderson*, 1 Texas, 93; *Clarke v. Bank of Mississippi*, 5 English, 516; *Stewart v. Swanzy*, 23 Mississippi, 502; *Barkman v. Hopkins*, 6 English, 157; *Lord v. Staples*, 3 Foster, 448; *Emery v. Berry*, 8 Foster, 473; *Dixon v. Thatcher*, 14 Ark. 141; *Charlesworth v. Williams*, 16 Illinois, 338.

Not admissible; *Adams v. Gay*, 19 Vermont, 358.

A digest of the laws of a State, which does not appear to have been published by authority of law is inadmissible; *Geron v. Felder*, 15 Alabama, 304.

Foreign laws or those of sister States are proved like other facts; and the unwritten laws and customs are ordinarily proved by the oral testimony of competent witnesses instructed in the law. *Tyler v. Trabue*, 8 B. Mon. 806; *Bryant v.*

of royal proclamations purporting to be so printed are evidence, even without proof that they were in fact so printed.^c The rules, orders, and regulations of the poor-law commissioners may be proved by a copy printed by the queen's printer, which copy after fourteen days from its date shall be received in evidence and judicially noticed, and shall be sufficient proof that it was duly made and is in force, until the contrary be shown.^d

The journals of the House of Lords have always been admitted as evidence of their proceedings, even in criminal cases;^e and those of the House of Commons are also admissible for the same purpose.^e The Parliament *roll or journal is the usual evidence of a sitting in the House of Lords.^h And where the enrolments and journals were wanting, a memorandum on a Parliament roll of a grant to the king by certain "magnates et proceres" named therein was held to be evidence of one of them having sat as a peer.ⁱ A writ of summons as a peer to Parliament is proved by the enrolment of it.ⁱ The journals have been received by a committee of privileges to prove the limitations in a patent of peerage without calling for the patent itself.ⁱ An unstamped copy of the minutes of the reversal of a judgment in the House of Lords, without more of the proceedings, is evidence of the reversal.ⁱ The

^c 8 & 9 Vict. c. 113, s. 3.

^d 7 & 8 Vict. c. 101, s. 71.

^e See *Jones v. Randall*, Cowp. 17; *R. v. Lord George Gordon*, Doug. 593; *Lord Melville's case*, 29 How. St. Tr. 549.

^h *Hastings Peerage*, 8 Cl. & F. 144.

ⁱ *Lord Dufferin's case*, 4 Cl. & Fin. 568.

Kelton, 1 Texas, 434; *Stevens v. Bomar*, 9 Humph. 546; *Gardner v. Lewis*, 7 Gill. 377.

Although in the case of an isolated and peculiar nation, like China, there may be admitted parol evidence of its laws, and this from persons not juriconsults, yet such evidence will be received only when it is so direct and positive as to be quite free from ambiguity *Wilcocks v. Phillips*, Wallace, Jr., 47.

Proof of the written law of a foreign country may be by some copy of the law, which the witness can swear was recognized as authoritative in the foreign country, and which was in force at the time; *Spaulding v. Vincent*, 24 Vermont, 501.

A copy of the civil code of France, purporting to be printed at the royal press in Paris and received in the course of our international exchange with the indorsement "La Garde des Sceaux de France a la Cour Supreme des Etats Unis," is admissible in the courts of the United States as evidence of the law of France; *Ennis v. Smith*, 14 Howard S. C. 400. The written or statute laws of a foreign government must be verified in the same manner as foreign judgments; by the exemplification of a copy under the great seal of State or by a sworn copy. The national seal, affixed to the exemplification of a foreign law or judicial proceeding proves itself; *Watson v. Walker*, 3 Foster, 471.

journals of the House of Lords are evidence to prove an address of the house to the king, and his answer,^k in order to support an averment in an information, that certain differences had existed between the King of England and the King of Spain. But the journals are not evidence of particular facts stated in the resolutions, which are not a part of the *proceedings* of the house. Upon the indictment of *Oates* for perjury, a resolution of the House of Commons of the existence of a popish plot was rejected as evidence of the fact.¹ Nor is a copy of an inscription on a tombstone, which copy was made from the minutes of a committee of privileges, evidence in another case.^m In *Knollys's case* it was held, that, upon a plea in abatement that the party was a peer, a replication was bad, which alleged that the peerage had been disallowed by the Lords.ⁿ Copies of the journals of either house purporting to be printed by the printers to the Crown or to either house are now evidence, without proof that they were so printed.^{o1}

*All public acts done by the Crown affecting the possessions and revenues of the Crown, are to be considered as public Acts, and are admissible in evidence as such.² An enrolment of a lease of lands belonging to the Crown in right of the Duchy of Lancaster is admissible,^p on account of the interest of the Crown in the duchy and its revenues. So examined copies of expired leases by the Crown, deposited in the office of his Majesty's Land Records and Enrolments pursuant to stat. 2 Will, IV., c. 1, were admitted to establish the title of the Crown to lands to which

^k *Franklin's case*, 9 St. Tr. 259, cited by Buller, J., 5 T. R. 445; and see 4 Str. Tr. 376, 445; Doug. 593.

¹ *R. v. Oates*, 10 How. St. Tr. 1079.

^m *Vaux Peerage*, 4 Cl. & F. 526.

ⁿ 2 Salk. 509.

^o 8 & 9 Vict. c. 113, s. 3.

^p *Kinnnersley v. Orpe*, Doug. 56; and see 13 M. & W. 475.

¹ The votes of the Assembly and minutes of Council have been admitted, in Pennsylvania, to prove the time of the notification of the repeal of an Act of Assembly, by the King in Council; *Lessee of Albertson v. Robeson*, 1 Dallas, 9. The printed journals of Congress have also been allowed to be read in evidence without proof of their authenticity; *Commonwealth v. Longchamp*, Philada. 1784, MS. Norris's Peake, 84, n. M.

² A printed copy of public documents transmitted to Congress by the President of the United States and printed by the printer to Congress is evidence; per Kent, C. J., *Radcliffe v. United Insurance Company*, 7 Johns. 38. In this case the printed copy of a letter from the British Secretary of State to the American ambassador was offered as evidence of the existence of a blockade. M.

such documents related.^a A book in which leases were enrolled and kept in the custody of the auditor of the Bishop of Durham (who is a patent officer within the county palatine,) is a public muniment. And therefore where search had been ineffectually made for an original lease to a lessee under the bishop, and the counterpart, it was held that such book was admissible as secondary evidence of such lease.^b

A caption of seisin taken to the use of the first Duke of Cornwall by persons assigned by his letters patent for that *purpose, was held admissible as a public act in evidence to [*284 show the rights of the duchy.^c

An instrument under the great seal of Scotland produced from the repository of the heir of entail of the family property, was admitted by the House of Lords as evidence of the creation of a peer with limitation in tail as therein stated, in the absence of any patent of creation.^d

Surveys, taken under authority, are also evidence. *Domesday-book* was a survey made of the king's lands in the time of William the Conqueror;^e and when a question arises whether a particular

^a *Doe dem. King William IV. v. Roberts*, 13 M. & W. 520. Enrolments, or examined copies of enrolments, deeds, certificates, receipts, or other instruments purporting to set forth a copy of the whole, or part thereof, and to be signed and certified by the keeper of the records of the Duchy of Cornwall, or of Lancaster, shall, without producing the original, or calling any attesting witness, and in the case of a certified copy, without other proof than the production of the certificate that such copy is a true one, be admitted in all legal proceedings to be proof of such original instrument, or enrolment thereof, or of so much as the copy purports to set forth, and that the original was duly made, granted, given, or executed by the parties thereto; 7 & 8 Vict. c. 65, and 11 & 12 Vict. c. 83.

^b *Humble v. Hunt*, Holt's C. 601; E. C. L. R. 3. A book produced from the chapter-house of the dean, &c., of S., kept by the chapter-clerk, and purporting to contain copies of leases, &c., granted by the dean, &c., held to be in the nature of a public document, and admitted in evidence to prove reputation as to boundary of a parish *Coombs v. Coether*, M. & M. 398; E. C. L. R. 22; and see *Humble v. Hunt*, above cited.

^c *Rowe v. Brenton*, 8 B. & C. 743; E. C. L. R. 15. And the same rules are applicable whether the lands and revenues are at any particular time vested in the Duke of Cornwall or the King. Held, therefore, that as the enrolment of a lease in the duchy office would be good evidence of a lease, if the Crown alone were interested, it was equally so in the case of a lease by the Duke; *Ibid.* 756.

^d *Huntley Peerage*, 5 Cl. & F. 349.

^e The public in general, and the legal profession more especially, are greatly indebted to Sir H. Ellis for his most valuable and instructive work on *Domesday*; a record in which the lawyer, the antiquary, and the historian possess one common

manor be of ancient demesne or not, that is, of the socage tenures which were in the hands of Edward the Confessor, the trial is by inspection of Domesday-book, which is preserved in the Exchequer.* Frequent changes in the names of places render evidence
 *285] for the purpose of identification very important.† It has been held that a variance between the modern name and that contained in Domesday ought to be averred on the record.‡ This ancient survey seems to be generally admissible as to all matters which it contains in respect of manors, and as to ancient local divisions or boundaries, the tenure or occupation of manors, lands, or mills; as also to matters of pedigree, and other immemorial rights or circumstances which are the subject of proof.

In the Exchequer also is another ancient survey, which ascertains the extent of the king's ports.§

The *valor beneficiorum*, a valuation of the profits of spiritual preferments made under a commission from Pope Nicholas III., and completed A. D. 1292, and known also by the title of Pope Nicholas's Taxation, is still preserved in the Exchequer, in the Office of the Queen's Remembrancer. In applying the restrictive clause in the statute 21 Hen. VIII., c. 13, concerning pluralities, and the exemptions from it, to college livings, their value is ascertained by this survey.¶ When the first fruits and tenths, on the

interest. Some curious particulars connected with the compilation of Domesday are to be found in Ingulphus's History of Croyland. Ingulphus, the abbot and learned historian of his own abbey, and the early friend of William the Conqueror, relates, with satisfaction, that the possessions of the abbey were underrated; and his statement fairly affords the inference that this was not a solitary instance of the kind. A tax, or census, proportioned to the possessor's revenues, would probably be suspected as one motive for compiling such a document.

* Hob. 188; Gilb. Law of Ev. 69, 6th ed.; Trial per Pais, 342; Bac. Ab. Ev. F. A very faithful copy of this document has lately been printed by government.

† See an instance cited, 2 Phil. Ev. 580, 9th edit., where the manor of Bowden was identified with that of Buggedine, in Domesday, by means of old deeds. In the case of *Alcock v. Cooke*, cited *ib.*, the question turned on what, according to the correct mode of reading Domesday, was parcel of the manor of Grantham, and whether the effect of a red line drawn through the words "Hythe Wapentake" denoted an error, or was for the purpose of drawing attention.

‡ *Gregory v. Williams*, 28 C. 2; Gilb. Law of Ev. 44; 3 Keb. 588.

§ Gilb. Law of Ev. 69; Bac. Ab. Ev. F.

¶ 2 Lut. 1305; *Humphreys v. Knight*, Cro. Car. 455; *Stamp v. Ayliffe*, 2 Gwill. 536. See the First Report of the House of Commons on Public Records. This taxation is evidence of the value at which those employed to make it estimated the living. See *Bullen v. Mitchell*, 2 Price, 477. And all taxes due to the king, as well as the pope, were regulated by it. As to the effect of this and other such

abolition of the papal power, were annexed to the Crown, a new *valor beneficiorum** was made, by which the clergy are at present rated.^o This valuation was made by commissioners under the great seal, who, in executing this duty, seem to have calculated the value of the first fruits and tenths, without regarding any modus or other legal exemption. A survey, dated 1563, from the First-fruits Office, of the possessions of the nunnery of St. Mary without the walls of York, was admitted to prove a vicar's right to certain tithes, although the original commission was lost.^a Parliamentary surveys under the Commonwealth are also admissible;^o and where the originals have been lost, as many were at the time of the great fire of London, copies of them, taken from unsuspected repositories, have also been admitted.^f So great is the reputed accuracy of these surveys, that their silence as to an alleged modus has been considered to be strong evidence against its existence.^g [*286]

Another ancient record is the *inquisitiones nonarum*, which was taken in the reign of Edward III., by commissioners under the great seal, upon the oath of the parishioners in every parish, in order to ascertain the value of the ninth of corn, wool, and lambs in every parish, a grant having been made by Parliament in the 14th year of the reign of that sovereign.^h

On the same ground an inquisition taken in 1730, by the direction of the House of Commons, has been received as [*287] conclusive evidence of the tenure and fees of the different offices

surveys, and also as to ministers' accounts, see Vol. II. tit. TITHES. It has been frequently asserted that this valuation was too low; see *Weston v. Vaughton*, 2 Phil. on Ev. 104, 9th ed., in which Lord Tenterden observed that it had been generally supposed that Pope Nicholas's valuation was too low; see also *Chapman v. Smith*, 2 Ves. sen. 506; *Bree v. Beck*, 1 C. & J. 267; 6 Price, 483.

^o 1 Bl. Com. 285. This *valor beneficiorum* is commonly called the *King's books*, a transcript of which is given in Bacon's *Liber Regis*, and in Ecton's *Thesaurus*.

^a *Kellington v. Master, &c., of Trinity College, Cambridge*, 1 Wills. 170; *Underhill v. Durham*, 2 Gwill. 542.

^o *Blundell v. Howard*, 1 M. & S. 292; see *infra*, note (p).

^f *Underhill v. Durham*, 2 Gwill. 542; 4 Dow. 297; *Green v. Proude*, 1 Mod. 117.

^g *Blundell v. Howard*, 1 M. & S. 292; *Rex v. Ireland*, 11 East, 284.

^h The commissioners were to levy the ninth in every parish, according to the rate at which churches were taxed, (viz., by Pope Nicholas's Taxation,) if the value of the ninth amounted to so much, but if not, then only according to the true value. See the Report of the Commissioners of Public Records, App.

to which it relates.¹ And, as it seems, upon the same principle, inquisitions under public commissions, but of limited extent, have also been received, as in the case of *Tboker v. The Duke of Beaufort*,^k where it was held that a return to a commission out of the Exchequer, in the reign of Elizabeth, to inquire whether the prior of St. Swithin, or the Crown, after the dissolution of the priory, were seised of certain lands, was evidence. So, in the case of *Doe v. Harcourt*,^l it was held that a survey of lands, belonging to the prebend of the Moor of St. Paul's, was admissible evidence against the lessees of the prebendary.

An ancient extent of Crown lands, produced from the proper place of deposit (the Lord Treasurer's Remembrancer's Office,) purporting to have been taken by the steward of the King's lands, and following in its construction the stat. 4 Edw. I., was held to be admissible, on the presumption that it had been taken under proper authority, although the commission could not be found.^m So an extent or survey of Crown lands, purporting to have been made in the time of Edw. III., by the steward of the Crown lands, and found in the Office of Land Revenue Records, is evidence of the title of the Crown thereto.ⁿ But on a question as to the boundary of a manor, formerly part of the Duchy of Lancaster, a document of the time of Elizabeth, produced from the Duchy Office, purporting to be a survey of the manor, taken by the deputy of the Surveyor-General of the Duchy under letters of *288] deputation *from him, by the oaths and presentments of tenants of the manor, whose names were subscribed, and who were therein called jurors at the Court of Survey, and containing a statement of the boundaries, a list of tenants and rents, and a presentment of the demesnes, of customs, of injuries suggested; and some other particulars, no authority for taking it being proved, was held not admissible, either as a survey taken taken under 4 Edw. I., st. 1, or as evidence of reputation; the statute not authorizing the tenants to find the boundaries.^o So a

¹ *Green v. Hewett*, Peake, C. 182; Peake, Ev. 85, 3rd ed.

^k Burr. 148; *Irish Society v. Bp. of Derry*, 12 Cl. & F. 641. But a return to a commission, not signed or sealed, is inadmissible, for *non constat*, it was not a draft; *Slane Peerage*, 5 Cl. & F. 24.

^l Peake, Ev. 84; and see *Carr v. Mostyn*, 5 Ex. 69.

^m *Rowe v. Brenton*, 8 B. & C. 747; E. C. L. R. 15; and see *Lord Carnarvon Villebois*, 13 M. & W. 532.

ⁿ *Doe dem. King William IV. v. Roberts*, 13 M. & W. 520.

^o *Evans v. Taylor*, 7 Ad. & E. 617; E. C. L. R. 34.

book purporting to be a survey of the lordship of Gower, made in 1650, by authority of Oliver Cromwell, after a grant by Parliament of that lordship to him, stating a presentment by the jury of certain payments as due to the lord, but not signed by them, no commission for making it being proved, was held not admissible as a public document, or as evidence of reputation. But the court seemed to doubt the correctness of the decision in the last-mentioned case upon the question of the admissibility of the document therein mentioned as evidence of reputation.^p

Inquisitions *post mortem* appear originally to have been taken before justices in Eyre upon the deaths of the King's tenants *in capite*.^q The stat. 1 Hen. VIII., c. 8, enacts, that these shall be taken on the oaths of twelve men, and in open places. These were afterwards placed under the jurisdiction of the Court of Wards and Liveries, erected in the 32d and 33d years of Hen. VIII. Upon the abolition of this court, together with the military tenures from which they sprung, the practice of taking such inquisitions ceased.

Such inquisitions thus made under authority are admissible, and are most important,^r although not conclusive *evidence* of [*289 their contents; but where the proceedings appear to have been irregular, such inquisitions are not receivable in evidence.*

It is not essential to the admissibility of evidence of this nature that the inquiry should have been made by means of witnesses examined on oath, it is sufficient that it was made by virtue of competent authority on behalf of the public, and on a subject-matter of public interest.

It is, however, of the very essence of evidence of this nature that the inquiry should have been made under proper authority; in general, therefore, unless the authority be in its nature notorious, it must be proved by the production of the commission, as in the case of an inquisition *post mortem*, and such private offices.^s

^p *Duke of Beaufort v. Smith*, 4 Ex. 451.

^q See 2 Bla. Com. 68. Vol. II. tit. PEDIGREE.

^r Lord Mansfield observed, in *Birt v. Barlow*, Dougl. 171, that it is easier to establish a pedigree for five centuries before the time of Charles the Second than for one century afterwards.

^s *Per* Lord Hardwicke, in *Sergeson v. Sealey*, 2 Atk. 412; *Lord Thanet v. Forster*, Jones, 224; and see the observations of Bayley, B., in *Beck v. Bree*, 1 C. & J. 256.

^t See Cruise on Dignities, c. 6, s. 60; and Vol. II. tit. PEDIGREE.

^u B. N. P. 228; *Evans v. Taylor*, 7 Ad. & E. 617; E. C. L. R. 34.

And in other cases, where it may be presumed that the commission under which the depositions were taken has been lost, they may be read without its production.* And in cases of general concern, such as the ministers' returns to the commission in Henry the Eighth's time to inquire into the value of livings, the party is not bound to give in proof the commission,⁷ and it would be attended with great inconvenience and expense to oblige parties to take copies of the whole record. Where no inquisition has been taken without legal authority it is inadmissible.⁸

Similar to these in their nature, but differing in point of authority, are old terriers, or surveys, whether ecclesiastical or *290] temporal, which are admissible to prove old tenures *or boundaries.^a Such boundaries are artificial and arbitrary, and cannot be established by the testimony of eye-witnesses; in such cases, therefore, unless surveys of antiquity and of authority were admissible, all evidence would frequently be excluded. It is however necessary to clothe such evidence with *some authority*, in order to distinguish it from the mere inaccurate description made by a stranger^b for purposes unknown. Ecclesiastical terriers, which contain a detail of the temporal possessions of the church in every parish, are made by virtue of an ecclesiastical canon,^c which directs them to be kept in the bishop's registry,^d or the registry of the archdeacon of the diocese,^e and it is not unusual to deposit a copy in the chest of the parish church.^f These being made under authority are admissible evidence, as a species of ecclesiastical memorials or records of the possessions of the church, and

* *Bayley v. Wylie*, 6 Esp. C. 85; *Rowe v. Brenton*, post, pp. 292, 293, note (t).

⁷ *Bayley v. Wylie*, 6 Esp. C. 85; *Vicar of Killington v. Trinity College*, 1 Wils. 170.

^a See below, *Latkow v. Eamer*, 2 H. B. 437; *Glossop v. Pole*, 3 M. & S. 175.

^b B. N. P. 248; Bac. Ab. Ev. F.; Gilb. Law of Ev. 70; *Chapman v. Cowlan*, 13 East, 10. An unsigned map, or terrier, is not evidence; *Earl, Clerk, v. Lewis*, 4 Esp. C. 1; though it purport to have been taken by competent authority, and have been generally received as authentic; *Pollard v. Scott*, Peake, 18, cor. Lord Kenyon; and see *Atkins v. Watson*, 2 Anst. 386; *Lygon v. Strutt*, ib. 601. Old surveys and maps, although not ecclesiastical, may also be admitted under similar circumstances as terriers; *Earl v. Lewis*, 4 Esp. 1; *Pollard v. Scott*, Peake, 19; *Wakeman v. West*, 7 Car. & P. 479; E. C. L. R. 32; *Doe v. Lakin*, ibid. 481.

^c See the principle, *supra*, p. 260.

^d 87th.

^e *Atkins v. Hatton*, 4 Gwill. 1406; 2 Anst. 386; *Pulley v. Hilton*, 12 Price, 625.

^f *Potts v. Durant*, 4 Gwill. 1450.

⁷ *Armstrong v. Hewett*, 4 Price, 218.

are as strong in their nature as any that can be adduced for such purposes.⁵

Terriers are admissible not only in suits between landowners on one side and the parson on the other, but also *in suits between a vicar and impropiator.^h A terrier is *always* [*291 strong evidence *against* the parson, but not for him, unless it has been signed by the churchwardens also, or (if they be nominated by him) by some of the substantial inhabitants, without which it deserves (it is said) little credit.ⁱ A terrier imperfect, because it has not been signed by the vicar, is still admissible.^k Upon a question of title between the vicar and rector, a terrier, signed by the churchwardens, but not by the vicar, was held to be not only admissible, but to be even stronger evidence for the successor than if it had been signed by the vicar for the time being; and it was held to be no objection, that it was not signed by any one who claimed under the rector.^l Old terriers, signed by the rector, churchwardens, overseers, and some of the resident parishioners, were held to be good evidence for the rector, to rebut the presumption of a *farm-modus* which was attempted to be established, although such terriers were not proved to have been signed by any person interested in the farm.^m

It is, in general, essential to the reception of ancient instruments of this kind, and indeed of all others, whether they be of a public or private nature, such as public surveys, inquisitions, or ancient deeds, that the authority of the document should be established by the only kind of proof of which it is in general capable; that is, by *proof that it came out of the proper repository.ⁿ [*292

⁵ *Drake v. Smyth*, 3 Price, 369; *Toymbee v. Brown*, 3 Ex. 117; and see that case as to their effect. Where for a long series of years 80*l.* a year had been paid as compensation in lieu of tithe, the Court of Exchequer held that it would be unreasonable to give any weight to a terrier signed in 1822, describing that payment as free from taxes and parochial assessments.

^h *Illingworth v. Leigh*, 4 Gwill. 1615; *Potts v. Durant*, 3 Anstr. 789. As to the effect of terriers in evidence, see *Atkins v. Drake*, M'Cle. & Y. 214; *Lake v. Skinner*, 1 J. & W. 9; *Stuart v. Grenall*, 9 Price, 106; Vol. II. TITHES.

ⁱ B. N. P. 248; *Earl v. Lewis*, 4 Esp. C. 1.

^k 4 Gwill. 1615.

^l *Illingworth v. Leigh*, 4 Gwill. 1615.

^m *Mytton v. Harris*, 3 Price, 19, Wood, B., *dissentiente*. He agreed that, as to such terriers as affected the parish generally, it would be sufficient if they were signed by any of the parishioners; but held that their signing a terrier would not make it admissible to affect a *farm-modus*.

ⁿ See *post*. Some person should *prove* that they come from the proper custody;

A document, purporting to be an endowment by a bishop, but without his seal, and an *inspeximus* of the bishop under his seal, were rejected, because they came out of the hands of a mere private person.^o In the case of *Michell v. Rabbetts*,^p it was held that an ancient grant to an abbey, in a manuscript, entitled "*Secretum Abbatis*," kept in the Bodleian Library at Oxford, was inadmissible, for want of proof of proper custody. On this authority also, it was held by Lawrence, J., that an ancient grant to a priory, found amongst the Cottonian Manuscripts in the British Museum, without proof of connection between the possession of the grant, and an interest in the estate,^q could not be received in evidence. But it is not necessary, in order to render a document admissible, that it should come from the most proper custody; it is sufficient, if it come from a place where it may reasonably be expected to be found.^r

Papers delivered by the son of a deceased rector to the successor's attorney, as old parish documents, are sufficiently identified by the attorney, without calling the son.^{s1}

An ancient extent of crown lands found in the proper office, and purporting to have been taken by a steward of the King's lands, and following in its construction the direction of the stat. 4 Edw. I.,
*293] will be presumed to have *been taken under proper authority, although the original commission cannot be found.^t

To show, therefore, the authenticity of ecclesiastical terriers, it must be proved that they were found in the proper repository, the bishop's registry, or that of the archdeacon of the diocese;^u or mere production by the counsel or the party is not generally enough; *Evans v. Rees*, 10 Ad. & E. 151; E. C. L. R. 37; but see *Doe v. Phillips*, 8 Q. B. 158; E. C. L. R. 55; *Doe v. Keeling*, 11 Q. B. 884; E. C. L. R. 63.

^o *Potts v. Durant*, 4 Gwill. 1450.

^p Cited 3 Taunt. 91.

^q *Swinmerton v. Marquis of Stafford*, 3 Taunt. 91; *Earl v. Lewis*, 4 Esp. C. 1. So it must be proved that records, when produced, come out of the proper custody; 1 Stark. C. 183; E. C. L. R. 2.

^r *Croughton v. Blake*, 12 M. & W. 205; see *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 183; E. C. L. R. 32; *Doe v. Phillips*, 8 Q. B. 158; E. C. L. R. 55.

^s *Earl v. Lewis*, 4 Esp. C. 1.

^t *Rowe v. Brenton*, 8 B. & C. 737; E. C. L. R. 15.

^u *Atkins v. Hatton*, 2 Anstr. 386; *Miller v. Foster*, *ibid.* 387, in note; 4 Gwill. 1406, 1593.

¹ Where a book of records of the proprietors of common lands (the proprietary being extinct) was produced by a person to whom it was delivered by his grandfather's executor, who had the possession of it for thirty years, it was held that the book was admissible in evidence; *Tolman v. Emerson*, 4 Mass. R. 160. G.

proof must be given to establish a connection between the terrier and the place in which it was found. As against a prebendary of Lichfield, a terrier found in the registry of the dean and chapter of Lichfield was held to be admissible,^x on the ground that the terrier was sufficiently connected with the place in which it was found, and because it was found annexed to an old and nearly cotemporary lease.^y And a terrier from the custody of a person who was the owner of the tithes of a district of the parish, has been held to be admissible.^z So terriers produced in support of a modus on the part of the landowners by the son of the registrar of the diocese who was also a solicitor in general practice, and who stated that he got them from the office where the general business of his father was carried on, were held admissible, though there was a muniment room in the cathedral, and it did not appear that the terriers had ever been deposited there.^a Yet one found in the charter-chest of Trinity College, Cambridge, which had property in the parish, was held to be inadmissible.^b

The king's sign-manual, authorizing the release of a prisoner, is evidence to prove the legality of his being at large.^c *But, in general the certificate by the king of a matter of fact [*294 under his sign-manual is not admissible in evidence.^d

The license of the pope, during his supremacy in this kingdom, is evidence of an impropriation.^e So his bull has been admitted to show that lands belonging to a monastery were discharged of tithes at the time of the dissolution.^f But it is said that a copy of a bull is not evidence.^g So an endowment by a bishop, under his seal,^h would be evidence, if derived from the proper custody.

^x *Miller v. Foster*, 2 Anstr. 387, in note; 4 Gwill. 1406.

^y 4 Gwill. 1453.

^z *Tucker v. Wilkins*, 4 Sim. 241. It is otherwise where the possession is merely private, and unconnected with the subject-matter; *Potts v. Durant*, 4 Gwill. 1450.

^a *Croughton v. Blake*, 12 M. & W. 205.

^b *Atkins v. Hatton*, 2 Anstr. 386; 4 Gwill. 1406.

^c *Miller's case*, Leach, C. C. L. 3rd edit. 69.

^d By Willes, L. C. J., in *Omichund v. Barker*, Willes, 550; 2 Roll. Abr. 686, H. Although in one old case such evidence was admitted, no exception being taken; *Abignye v. Clifton*, Hob. 213.

^e *Cope v. Bedford*, Palm. 427; Gilb. Law of Ev. 69; Bac. Abr. Ev. F.

^f *Lord Clanrickard's case*, Palm. 38.

^g *Brett v. Ward*, Winch. 70; but *qu.*, ante.

^h *Potts v. Durant*, 4 Gwill. 1450; 3 Anstr. 789.

Certificates,ⁱ and other documents made by persons entrusted with authority for the purpose, may also be considered as public documents, and they are evidence against all to the extent of the officer's authority, of the facts which he is directed to certify, but not further.^k For, where the law has appointed a person to act for a specific purpose, the law must trust him as far as he acts under its authority.^l Therefore the indorsement of the officer upon a deed of bargain and sale is evidence of its enrolment.^m And so is the indorsement on a deed under the Mortmain Act.ⁿ The chirograph of a fine is evidence of *the fine, because the officer is
 *295] appointed to give out copies of the agreements between the parties that are lodged of record. Wherever it is an essential part of the officer's duty to deliver out copies of a record, such copies are evidence.^o But if it be not his duty, such certificates or copies are not evidence.^p Where a court has, for its own convenience, appointed officers to make out copies, such copies are evidence in that Court without further proof, but not elsewhere. Thus an office copy of depositions is admissible in equity, without examination with the roll, but is not receivable in a court of law.^q By the 7 & 8 Will. III., c. 7, s. 5, the entry in the book kept by the clerk of the Crown for entering returns of members to serve in Parlia-

ⁱ See further, as to certificates, Vol. II. tit. CERTIFICATE.

^k *Omichund v. Barker*, Willes, 549.

^l B. N. P. 229.

^m *Kinnersley v. Orpe*, Doug. 57.

ⁿ Under the Mortmain Act, 9 Geo. II. c. 36, the deeds conveying the lands must be enrolled in the Court of Chancery within six calendar months after its execution. A conveyance of this kind was offered in evidence, having an indorsement purporting to be a memorandum of the enrolment of the indenture in Chancery on a certain day, and to be signed by one who was proved to be clerk of the enrolments, although not so described in the indorsement. The Court ascertained, by inquiry, that it was the practice in the Enrolment Office for the officer, when he makes the enrolment, to deliver back the original deed with the certificate of enrolment indorsed upon it, and held, that the indorsement was evidence both of itself, and of the fact which it purported to state; *Doe dem. Williams and others v. Lloyd*, 1 M. & G. 671; E. C. L. R. 39; and see now the statute, *ante*, p. 263.

^o See *Black v. Lord Braybrooke*, 2 Stark. C. 7, 13; E. C. L. R. 3; and see below, tit. JUDGMENTS—JUDICIAL DOCUMENTS.

^p *Roberts v. Eddington*, 4 Esp. 88; *Sewell v. Corp.*, 1 C. & P. 392; E. C. L. R. 12; *Drake v. Marryat*, 1 B. & C. 473; E. C. L. R. 8; *Waldron v. Coombe*, 3 Taunt. 162; *R. v. Sewell*, 8 Q. B. 161; E. C. L. R. 55; see *Brown v. Thornton*, 6 Ad. & E. 185; E. C. L. R. 33.

^q B. N. P. 229; *Black v. Lord Braybrooke*, 2 Stark. C. 6; E. C. L. R. 3; *Burnand v. Nerot*, 1 Car. & P. 578; but see *ante*, p. 261; E. C. L. R. 12.

ment, and alterations and amendments, or a copy of so much as relates to the return, is made evidence thereof in an action for a false or double return. So by many other statutes, authorized entries and documents, which will be noticed in their proper places, are made evidence.^r

*With respect to all these and some other documents, it has been enacted by 8 & 9 Vict. c. 113, that "whenever by any statute then or afterwards to be in force, any certificate, official or public document, or document or proceeding of any corporation, or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any Committee of either House, or in any judicial proceeding, the same shall be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made; without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."^s [296]

Public registers, although not originally intended for the purposes of evidence, are generally admissible in support of the facts to which they relate, for they are made by persons in an official situation, whose duty it is to make the entries accurately of the facts immediately within their knowledge.^t These are, the *registers*

^r See 14 & 15 Vict. c. 6, s. 16, as to examinations under Mutiny Act; also 5 & 6 Geo. IV. c. 84, s. 24, and 7 & 8 Geo. IV. c. 28, s. 11, as to certificates of indictments and convictions. Where, upon a question as to the delivery of a cask of whisky, the court below had decided it upon the effect of extracts from the excise books, and the certificate of a commissioner of excise, as to the accuracy of the books from which such extracts were taken, the House of Lords reversed the judgment, as having been decided upon inadmissible evidence. Excise books, as public documents, might be received; or if, on account of public convenience, the originals could not be produced, examined copies on oath might be produced; *Dunbar v. Harvie*, 2 Bli. 351.

^s Sect. 1.

^t There is a great number of public books directed to be kept by various statutes, which on these grounds are evidence; a list of some of them may be found, 2 Taylor on Ev. p. 1053.

*297] kept in churches," *of baptisms, marriages,^v and burials,^w and by the registrars of births, deaths, and marriages.^{1x} Al-

^v These were originally instituted at the instigation of Lord Cromwell, who (temp. Hen. VIII.) was Vicar-General to the King, and before whom all wills to the value of 200*l.* were to be proved. This appointment was afterwards confirmed by the injunction of Edward VI., who directed that the registering should be in the presence of the parson and churchwardens, on a Sunday, and that the book should be kept locked in the church, the vicar and churchwardens having keys; see Salk. 281; Gilb. Law of Ev. 76. The Marriage Act, 26 Geo. II. c. 33, s. 14, directed that, immediately after the celebration of every marriage, an entry thereof should be made in a register, in which it should be expressed that the marriage was celebrated by banns or license; and if both or either of the parties married by license were under age, with consent of parents or guardians, as the case might be; and should be signed by the minister with his proper addition, and also by the parties married, and attested by two credible witnesses. This form, however, was directory only, and an examined copy of a marriage regularly attested by one witness only, under this statute, was admissible; *Doe dem. Blayney v. Sewage*, 1 C. & K. 487; E. C. L. R. 47. By the stat. 52 Geo. III. c. 146, s. 7, registers of baptisms, marriages, and burials were directed to be kept by the officiating clergyman in a particular form, and copies of these registers, verified by the officiating minister of the parish, were directed to be transmitted annually by the churchwardens, after they or one of them should have signed the same, to the registrar of the diocese; and these provisions, as to baptisms and burials, are still in force; see 6 & 7 Will. IV. c. 86, ss. 1 and 49. Provisions of a similar nature had been made by the canons of 1603, but these prescriptions had fallen into disuse; see 3 Burn's Ecc. Law, 459; Gibson's Codex, 204; and Vol. II. tit. MARRIAGE.

^w By 6 & 7 Will. IV. c. 86, the provisions before in force under 52 Geo. III. c. 146, and 4 Geo. IV. c. 76, are repealed from the 1st March, 1837; but the provisions as to baptisms and burials are continued, sects. 1 and 49. By that statute, however, marriage registers are to be provided for every church and chapel in which marriages may be solemnized, and also for Quakers' chapels and Jewish synagogues, in duplicate, one to be kept by the officiating clergyman or person, and the other to be returned to the Registrar-General; see ss. 30, 31. A register of marriages kept in Barbadoes is evidence of a marriage, being required by law to be kept, and an examined copy has been received in evidence; *Cood v. Cood*, 1 Curt. 755.

^x Sid. 71; Godb. 145.

¹ By 6 & 7 Will. IV. c. 86, provisions are made for the registry of births, deaths and marriages by registrars throughout the country, in a full form containing various particulars given in the schedule to the Act, which are to be supplied by various persons within a certain time, and under certain penalties for giving false information. A general register office for England is established in the metropolis,

¹ As to the admissibility of such registers or sworn copies see 5 Peters, 470; *Kingston v. Lesley*, 10 Serg. & R. 383; *Hyam v. Edwards*, 1 Dall. 2; *Stoever v. Whitman's Lessee*, 6 Binn. 416; *Sumner v. Sebec*, 3 Greenl. 223; *Wedgwood's case*, 8 Greenl. 75; *Martin v. Gunby*, 2 Harr. & John. 248; *Jackson v. King*, 5 Cowen, 237; *Jackson v. Boneham*, 15 Johns. 226.

though the *entries are first made in a day-book of a church register, such day-book is not evidence when the entry has [*298 been made in the register.^y And therefore, where in the day-book the letters B B were added which were explained to mean base-born, but were not added in the subsequent entry in the register, the court held that the entry in the register could not be controlled or altered by the entry in the day-book, for there could not be two registers in the same parish.^z An entry in the register of baptism by a minister, of the baptism of a child which had taken place before he became minister, and made on the information of the clerk, is not admissible evidence, neither is the private memorandum of the clerk, who was present at the baptism;^a nor is a parish register produced by the parish clerk without explanation of his possession of it, for it is not produced from the *proper custody, parish registers [*299 being directed by statute to be kept by the clergyman.^b

A register is evidence, even between strangers, as to the time of marriage.^c And a statement in the church register that a child was base-born has been received in evidence.^d But the church register is no proof of the identity of the parties;^e nor is it evi-

and by s. 38, the Registrar-General is to cause "to be sealed or stamped with the seal of the register office all certified copies of entries given in the said office; and all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office shall be of any force or effect which is not sealed or stamped as aforesaid."

^y *May v. May*, Str. 1073, *per* Probyn and Lee, Js., Page, J., *dissentiente*; see *Walker v. Wingfield*, 18 Ves. 443.

^z *May v. May*, Str. 1073; *Lee v. Meacock*, 5 Esp. C. 177. If the entry in the day-book, which represented the plaintiff to be illegitimate, had been made under the direction of the reputed father and mother, the evidence would, it seems, have been admissible as the declaration of a deceased parent. In the absence of such evidence, it appeared to be nothing more than a private memorandum, made for the purpose of assisting the clerk to make up the register.

^a *Doe v. Bray*, 8 B. & C. 813; E. C. L. R. 15.

^b *Doe dem Arundle v. Fowler*, 19 L. J., N. S., Q. B. 151.

^c *Doe v. Barnes*, 1 M. & Rob. 386.

^d *Cope v. Cope*, 1 M. & Rob. 269; being evidence of reputation. It was there said that similar evidence had been received in a prior case, *Morris v. Davis*, 3 Car. & P. 215; E. C. L. R. 14.

^e *Birt v. Barlow*, 1 Doug. 170; *Bain v. Mason*, 1 C. & P. 202; E. C. L. R. 12; *Barber v. Holmes*, 3 Esp. 190; see tit. POLYGAMY—MARRIAGE. As to how the identity may be proved, see *Sayer v. Glossop*, 2 Ex. 409.

dence that a party was of the particular age stated in the register;^f nor, without evidence to show that the party was young when christened, is it evidence that he was born within the parish.

The books of the Fleet Prison are not admissible in evidence to prove a marriage, for they are not made under public authority.^g
 *300] Nor is the copy of a register *of a foreign chapel admissible here to prove a marriage abroad.^h Nor a copy of an entry in the book kept at the British Ambassador's in Paris, wherein his chaplain makes and subscribes entries of all marriages celebrated by him.ⁱ Neither is the copy of a register of baptism in Guernsey;^j nor the register of a dissenting chapel.^k Nor an entry of the cir-

^f *Wißen v. Law*, 3 Stark. C. 63; E. C. L. R. 3; *R. v. Clapham*, 4 Car. & P. C. 29; E. C. L. R. 19; *R. v. North Petherton*, 5 B. & C. 508; E. C. L. R. 11; *Burghart v. Angerstein*, 6 C. & P. 690; E. C. L. R. 25; *Duins v. Donovan*, 3 Hag. 301; *R. v. Lubbenham*, 5 B. & C. 968; E. C. L. R. 11; *R. v. St. Katherine*, *ibid.* 970. But under the Registration Act, if the place of birth or death be added by direction of the Registrar-General, the register it would seem is evidence thereof; 6 & 7 Will. IV. c. 86, s. 38; 7 Will. IV. & 1 Vict. c. 22, s. 8.

^g *Reed v. Passer*, Peake, C. 231; *Doe dem. Orrel v. Madox*, 1 Esp. 197; *Haywood v. Firmin*, Peake, C. 233; *Howard v. Burtonwood*, *ibid.* n.; *Cooke v. Lloyd*, *ibid.*; *Doe v. Gatacre*, 8 C. & P. 578; E. C. L. R. 34. But, *semble*, that on a question of *pedigree*, the books of the Fleet are evidence to show the name by which a woman passed when she was married there; *Lawrance and others v. Dixon*, Peake, 136; 1 Esp. 213. And in *Doe v. Lloyd*, Shrewsb. Sum. Ass., Heath, J., admitted them in evidence; see Peake, Ev. 87. These books, and the registers of marriages performed at the King's Bench Prison, at May Fair, and the Mint, &c., have been purchased by government, and are deposited in the office of the Registrar-General, under 3 & 4 Vict. c. 92, but by express exception (ss. 6 and 20) are not thereby made receivable in evidence. The Fleet Books contain the original entries of marriages solemnized in the Fleet Prison from 1686 to 1754; Phillips on Ev. Vol. II. p. 595, 9th ed.

^h *Leader v. Barry*, 1 Esp. 353; see further, Vol. II. tit. MARRIAGE.

ⁱ *Athlone Peerage*, 8 Cl. & Fin. 262. As to proof of foreign marriages, see *infra*, note.

^j *Huet v. Le Mesurier*, 1 Cox, 275; but see as to this, 1 Curt. 766.

^k For it is not a public document; *Newham v. Raithby*, Phill. 315. A register of baptism of the child of a dissenter (twenty-five years after the alleged birth), containing the words, "said to be born," &c., being mere hearsay and information, and therefore of no assistance in establishing the fact, was refused to be allowed to remain as a part of the proceedings; *Duins v. Donovan*, 3 Hag. 301. An entry of the birth of a dissenter's child, in a book kept at Dr. William's Library in Redcross Street, was held to be inadmissible evidence; *Ex parte Taylor*, 1 J. & W. 483. The books of baptisms, marriages, and deaths in India must be brought from their place of deposit at the India House; Taylor on Ev. 1055. In order to establish the determination of a life estate, hearsay evidence of the death of the *cestui que vies* is not, as in a case of pedigree, sufficient; nor is the register of a

cumcision of a Jewish child, made in a book kept in the synagogue by the Chief Rabbi, since deceased, who performed the rite, which entry was made in the course of his duty.¹ But by stat. 3 & 4 Vict. c. 92, certain registers of births, baptisms, deaths, burials, and marriages are directed to be deposited with the Registrar-General, and, subject to certain provisions as to giving notice to the opposite party, are *made evidence in all cases; and certified extracts, subject to similar provisions, are likewise, except in criminal proceedings, rendered evidence in every court of justice.^m [*301
*The rule as to proof of marriages, &c., by the registers in [*302

dissenting chapel, or an inscription on a tombstone in the adjacent burial ground, receivable; *Whittuck v. Waters*, 4 C. & P. 375; E. C. L. R. 19.

¹ *Davis v. Lloyd*, 1 C. & K. 275; E. C. L. R. 47.

^m Under this statute, (see 9 Car. & P. 793, E. C. L. R. 38,) the following registers have been made evidence:

The Registers of the French Churches in England, commencing in the year 1567.

"	German Chapels	"	"	"	1669.
"	Dutch Chapel Royal	"	"	"	1689.
"	Swiss Church	"	"	"	1762.
"	Presbyterians throughout Eng-				
	land and Wales,	"	"	"	1642.
"	Independents,	"	"	"	1644.
"	Baptists,	"	"	"	1642.
"	Scotch Churches in England,	"	"	"	1758.
"	Society of Friends throughout				
	England and Wales,	"	"	"	1644.
"	Wesleyan Methodists,	"	"	"	1772.
"	Methodists, New Connection,	"	"	"	1787.
"	Primitive Methodists,	"	"	"	1813.
"	Bible Christians,	"	"	"	1817.
"	Inghamites,	"	"	"	1753.
"	Moravians,	"	"	"	1742.
"	Lady Huntingdon's Connection,	"	"	"	1752.
"	Calvinistic Methodists,	"	"	"	1762.
"	Swedenborgians throughout				
	England and Wales,	"	"	"	1787.

The Registers from Dr. Williams's Library in Red-

cross Street, " " 1742.

" The Paternoster Row Registry, " " 1808.

The Bunhill Fields' Registers, " " 1713.

The Registers of the Liverpool Necropolis, " " 1825.

" Deadman's Place Cemetery, " " 1738.

" Southwark, " " 1835.

" Leeds Cemetery, " " 1819.

" Walworth Burial Ground, " " 1834.

" Ecclesall Cemetery, " " 1834.

or to prove their handwriting, although the register be produced." Even where the object is to prove the identity of a person named in the register,^a and this is done by a witness who swears to *his handwriting in the register, an examined copy is suf- [*303 ficient. It has been held at Nisi Prius,^t that annual returns made to the registry of the diocese, according to the requisitions of the 70th canon, are admissible only as secondary evidence, but that returns made under the stat. 52 Geo. III., c. 146, would be proveable by examined copies of originals. A copy taken from a book produced by the parson of a parish, as being the parish register, upon application made to him for it, will be sufficient." But if to such application he reply that there is no such register for the particular year, that will not be evidence of loss sufficient to let in secondary evidence.^v Entries in registers kept under the General Registry Act may be proved by certified copies under the office seal.^w

Other parish books are also receivable in evidence in certain cases; thus, in an action for the disturbance of the plaintiff in the

^r *Birt v. Barlow*, Doug. 173; see *Drake v. Smyth*, 5 Price, 369.

^s *Sayer v. Glossop*, 2 Ex. 409.

^t *Walker v. Beauchamp*, 6 C. & P. 552; E. C. L. R. 25; *Wißen v. Law*, 3 Stark. 63; E. C. L. R. 3; *Doe dem. Wood v. Wilkins*, 2 Car. & K. 328; E. C. L. R. 61.

^u *Walker v. Beauchamp*, 6 C. & P. 552; E. C. L. R. 25. But a copy of a book, produced simply by the clerk, would not be *supra*, note.

^v *Ibid.*

^w See *ante*, p. 297, note (x); p. 302, notes (o), (p); p. 301, note (m), where see an exception.

several persons whose pedigree is thus proved, are within the savings of the statute of limitations; *Jacocks v. Gilliam*, 2 Murphy, 47.

The record of a baptism, made by a parish minister, who was dead, has been received in evidence in Connecticut; *Huntley v. Comstock*, 2 Root, 99. And in Massachusetts, a certified copy of the record of a clergyman or justice of the peace is constantly admitted in evidence to prove a marriage.

A sworn copy of the records of a town in Connecticut, wherein were contained the date of the marriage of the parents of the plaintiff, and the time of the birth of their children, was held to be admissible evidence by the Supreme Court of New York; *Jackson v. Boneham*, 15 Johns. 226. A copy of such record certified by the clerk of the town, if within the State, is received in evidence without objection, in Massachusetts.

M.

A book found in the hands of the town clerk and purporting to be a record of births and marriages in the town, has been held in Maine to be *prima facie* evidence of the facts it contains, as for example of the age of a person; *Sumner v. Sebec*, 3 Greenl. 223.

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use of his pew at church, an old entry made in the vestry-book by the churchwardens, stating that the pew had been repaired by the owner of a messuage under whom the plaintiff claimed, was admitted as evidence of the right having been made as to a fact within the scope of the churchwarden's office, and being evidence of the reputation in the parish as to the right.^{*} An entry in a vestry-book has also been admitted to prove an averment in an indictment for a libel, that the prosecutor had been elected treasurer at a vestry duly held in pursuance of notice.⁷ An old book produced by a churchwarden from the parish chest, in which the names of the surveyors of the highways were stated, *304] was received by Coleridge, J., to prove who were surveyors at that time.⁸

But on an appeal, the respondents, in order to prove the fact of the delivery to them of a certificate given by the appellants, acknowledging the pauper to be their settled inhabitant, produced an old book from their own parish chest, in which was an entry of that fact in the handwriting of a former parish officer. It was held that such evidence was inadmissible, being a matter discharging his own parish.⁹

An old entry in a vestry-book is not admissible on the part of the parishioners to show that they have the right concurrently with the rector to elect to a parish office, there being nothing to show that the rector was present at the meeting.^b But such entries at meetings where the rector was present are receivable.^c

By the 17 Geo. II., c. 38, s. 13, copies of all rates and assessments for the relief of the poor are to be kept in a book by the churchwardens and overseers of every parish, which is to be kept in a public place in the parish, and to be produced at the sessions, when any appeal is to be heard. In the case of the *Zouch* peerage, a parish book of rates and loans was admitted as evidence of the existence and residence of a party in the parish in the year 1649, by the entry of the payment of her subscription to a parish loan in that year.^d

^{*} *Price v. Littlewood*, 3 Camp. 288; see Vol. II. tit. PEW.

⁷ *R. v. Martin*, 2 Camp. C. 100.

⁸ *R. v. Inhabitants of Pembridge*, Car. & M. 157; E. C. L. R. 41.

⁹ *R. v. Debenham*, 2 B. & A. 185.

^b *Hartley v. Cooke*, 5 C. & P. 441; E. C. L. R. 24.

^c *Ibid.*; and extracts from the register of the Bishop of the diocese were read to prove the same appointments.

^d Printed Evidence, 162. Entries by a churchwarden not made in the course of

By the 42 Geo. III., c. 46, the churchwardens and overseers^e are to keep a book containing the names of all *parish apprentices, and of the other particulars required by the Act; the [*305 entries are to be signed by the justices who assent to the indentures; and when the latter are proved to have been destroyed or lost, such register is to be deemed sufficient evidence in all courts of law in proof of the existence of such indentures, and of the other particulars specified in the register: and each entry, if approved, is to be signed by the justices, and such book may be inspected at all seasonable hours, and a copy taken, if the indentures are lost or destroyed.

The register of the Navy Office, made up from the captains' returns, with proof of the method there used to enter all persons dead with the letters D d, is evidence of such death.^f And so is the muster-book transmitted by the officers of the ship to the Navy Office.^g The book kept at the Sick and Hurt Office, in which are copied the different returns made by officers of the navy, of persons dying on board, is evidence to show the time of a seaman's death.^h So the log-book of a man-of-war which convoyed a fleet, is evidence to prove the time of sailing.ⁱ *But the log-book of a merchantman can only be used by a witness [*306

his official duty, and by which he does not charge himself, are not admissible; *Cooke v. Bankes*, 2 C. & P. 478; E. C. L. R. 14; *Taylor v. Devey*, 7 Ad. & E. 409; E. C. L. R. 34.

^e By 2 Geo. III. c. 22, a register of all infants in workhouses within the Bills of Mortality, with their names, ages, and other description, was also directed to be kept by these officers.

^f B. N. P. 249; Bac. Abr. Ev. F.; *R. v. Rhodes*, Leach, C. C. L. 4th ed. 24; *R. v. Fitzgerald and Lee*, *ibid.* 20.

^g *R. v. Fitzgerald and Lee*, Leach, C. C. L. 20; *R. v. Rhoades*, *ibid.* 24.

^h *Wallace, Administrator, v. Cooke*, 5 Esp. C. 117. But where the wife of A. B. obtains goods after stating that her husband is dead, it is not a sufficient answer to an action for the amount, to show, by the muster of a ship from the Admiralty, that a person of the name of A. B. was living at the time; *Barber v. Holmes*, 3 Esp. C. 190; Kenyon, C. J., 1800. As to the books at Lloyd's, see *Abel v. Potts*, 3 Esp. C. 242, and Vol. II., tit. POLICY.

ⁱ *D'Israeli v. Jowett*, 1 Esp. C. 427. Such log-book and the official letter of the commander to the Admiralty were read without objection, as proof that the fleet encountered a storm, and that a particular vessel parted company; *Watson and another, Administrators of Maxwell v. King*, 4 Camp. 272, Ellenborough, C. J.,

¹ The log book, kept by the mate, is not evidence on an indictment against the crew for a revolt and confining the master; *United States v. Sharp, et al.* Peter's C. C. Rep. 119.

to refresh his memory, with respect to a fact which he remembers to have seen there at a time when he had a clear recollection of the circumstance.^j Where a statute required that every vessel engaged in the whale fishery should carry out an apprentice for every fifty tons, and that the same should be verified by the master, mate, and two of the mariners, it was held that an affidavit verifying a muster-roll, upon which it appeared that a certain number of apprentices was on board when the vessel *cleared out*, is *prima facie* evidence that such apprentices were on board when the vessel *sailed*.^k So a copy of an official document, made in pursuance of an Act of Parliament, containing the names, capacities, and descriptions, of passengers transmitted by captains in the India trade to the Court of Directors, was held to be good proof of such persons being on board.^l

Excise-books are public documents.^m In *R. v. Grimwood*,ⁿ it was held that excise-books transcribed from the maltster's specimen-paper were admissible evidence against him without calling the officers to substantiate them, even although they were charged to be fraudulent and collusive, without proof given that they were so. The custom-house copy of the searcher's report, produced by the officer in whose custody it is lodged, is evidence of the actual shipment of the goods therein specified.^o But a shipping entry at the

*307] Custom House, although *for some purposes a public document, is not evidence to affect the person whose duty it was to cause the entry to be made, criminally; the note from which the entry had been made by the office having been accidentally destroyed.^p Books and official documents kept at the Stamp Office

1815; *Barber v. Holmes*, 3 Esp. 190. So lists of convoy; *Richardson v. Mellish*, 2 Bing. 241; E. C. L. R. 9.

^j *Burrough v. Martin*, 2 Camp. 112.

The log-books of merchant-ships are now regulated by the Mercantile Marine Act, 1850; 13 & 14 Vict. c. 93, s. 85. They are to be kept in a form sanctioned by the Board of Trade, and certain entries are to be made in them under a penalty.

^k *Lacon v. Hooper*, 1 Esp. C. 246.

^l *Richardson v. Mellish*, 2 Bing. 229; E. C. L. R. 9; see 3 & 4 Will. IV. c. 92, s. 3; and see *Huntley v. Donovan*, 15 Q. B. 96; E. C. L. R. 69.

^m *Fuller v. Fotch*; Carth. 346.

ⁿ 1 Price, 369.

^o *Tomkins v. Attorney-General*, 1 Dow. 404; *Johnson v. Ward*, 6 Esp. C. 47. Note, that the paper was proved to have gone with the ship.

^p *Hughes v. Wilson*, 1 Stark. C. 179; E. C. L. R. 2. So a captain's report to the Custom House, 15 Q. B. 96; E. C. L. R. 69.

under certain Acts,^a and the Merchant Seaman's Register Officer, are public documents, and admissible to prove the matters which in the course of duty are recorded therein.

Under the Mercantile Marine Act,^b upon complaint by the master, any of the mates, one third of the crew, or the consignee of any ship, in case it be out of her majesty's dominions, a court is to be constituted in manner there prescribed, which may hear complaints, and discharge any seaman, or supersede the master. The report of the proceedings and evidence taken before this court is to be sent to the Board of Trade; and if it purport to be signed by the senior officer of the Court, and sealed with the consular seal, and be produced out of the custody of the Board of Trade or its officers, it shall be admitted as evidence.

The entry of the contract in the book of the clerk of the coal market in London is not evidence of the sale under 47 Geo. III., sess. 2, c. 68, s. 29, unless the buyer be proved *aliunde* to have signed the contract; although the Act directs that all contracts for the sale of coals shall be signed by the buyer and the factor, that the factor shall deliver a copy to the clerk, who shall enter it in a book, and although the 32d section makes such *entries evidence in all cases, suits, and actions touching anything [*308 done in pursuance of the Act.^c

Rolls of Courts Baron are also regarded as public documents,^d and the bill of cravings of a sheriff entered, and allowed, and of record in the Exchequer, was held admissible evidence upon a question of the duty of the sheriff of the county.^e

The poll-books at an election for members in Parliament are evidence in a penal action for bribery.^f So the daily-book kept by the keeper of Newgate, and the books of the Queen's Bench and Fleet prisons, are evidence to prove the dates of the commitments

^a 7 & 8 Vict. c. 113, ss. 19, 20; 6 & 7 Will. IV. c. 76, s. 8.

^b 7 & 8 Vict. c. 112, s. 25; 5 & 6 Will. IV. c. 19, s. 19. There are also other regulations of a similar kind, which will be noticed under the heads to which they belong.

^c 13 & 14 Vict. c. 93, s. 82.

^d *Brown v. Capel*, M. & M. 374; E. C. L. R. 22.

^e B. N. P. 247; *Doe d. Askew v. Askew*, 10 East, 520; *Breeze v. Hawker*, 14 Sim. 350.

^f *R. v. Antrobus*, 6 C. & P. 784; E. C. L. R. 25.

^g *Mead v. Robinson*, Willes, 422; *R. v. Hughes*, cited *ibid.*; *R. v. Davis*, 2 Stra. 1048; 6 & 7 Vict. c. 18, ss. 93, 96. By s. 94, office copies are made evidence; and see *R. v. Ledgard*, 8 Ad. & E. 535; E. C. L. R. 35.

and discharges of prisoners,^x although the entries are sometimes made from the information of the turnkeys, and the indorsements upon the warrants.^y But they are not evidence of the cause of commitment, the commitment itself being the best evidence.^z And it seems that they are not strictly public documents, so as to warrant the reception of a copy in evidence, since the gaoler is not required to make such entries, but does it for his own information and security.^a

*309] ^aThe books of the Bank of England are evidence to prove the transfer of stock.^b The book kept in the master's office in the Court of King's Bench is evidence to prove that a particular person is an attorney of the court.^c

The bishop's register was held to be admissible to establish a custom as to the nominating a curate,^d and so a collation to a benefice from the Bishop's Registry, to prove the exercise of the right to collate.^e

So corporation books concerning the government of a city or town, where they have been publicly kept, and the entries have been made by a proper officer, are admissible evidence of the facts

^x *R. v. Aickles*. Leach, C. C. L. 4th ed., 438; 3 B. & P. 188.

^y *Salte v. Thomas*, 3 B. & P. 188; on the ground that it had been the constant and established practice of the keepers of public prisons to register the discharge of prisoners in such books.

^z *Ibid.* This case, therefore, and some others of a similar nature, do not rest upon the ground that the entry was made by an authorized officer.

^a *Ibid.* And it is difficult to see on what ground they are evidence at all, unless the persons who made the entries were shown to be dead, when they might be treated as entries made in the course of business. Thus the register of attendances and of reports relative to sickness kept by the medical officer of a poor-law union, in obedience to rules made by the poor-law commissioners under 4 & 5 Will. IV. c. 75, s. 15, is not receivable; *Merrick v. Wakley*, 8 Ad. & E. 170; E. C. L. R. 35.

^b *Marsh v. Colnett*, 2 Esp. C. 665; *Breton v. Cope*, Peake, C. 43.

^c *R. v. Crossley*, 1 Esp. C. 526; and see *Jones v. Stevens*, 11 Price, 235.

^d *Arnold v. Bishop of Bath and Wells*, 5 Bing. 316; E. C. L. R. 15. A faculty by Archbishop of Canterbury to inhabitants of *F.*, to christen and bury there, is evidence to show that *F.* is not a parish; *Isham v. Wallace*, 4 Sim. 25. Extracts from the Bishop's register of the appointment to parish offices are evidence to show the right exercised by the parishioners concurrently with the rector; *Hartley v. Cooke*, 5 C. & P. 441; E. C. L. R. 24; and see *Bishop of Meath v. Belfield*, 1 Wils. 215; *Bullen v. Michel*, 2 Price, 399. See further, as to Bishop's books, *Humble v. Hunt*, Holt's C. 601; E. C. L. R. 3; *Coombs v. Coether*, M. & M. 398; E. C. L. R. 22.

^e *Irish Society v. Bishop of Derry*, 12 Cl. & F. 641.

witnessed in them.^f But an entry in the public books of a corporation is not evidence for the corporation, unless it be an entry of a public nature.^g

A book kept by order of the chancellor was held to be good secondary evidence of the allowance of a certificate of bankruptcy; but a book kept in the office of the secretary of bankrupts, without such order, is not admissible.^h *Books in the office of clerks of the peace of enrolments of deputations of game-keepers for a manor, are admissible to prove the exercise of manorial rights, without proof of the loss of the original deputations, and that the gamekeepers acted under them.ⁱ [*310]

The registry^j of a ship is evidence to negative ownership, since no one can be an owner who is not registered as such;^k but the registry is not necessarily proof of ownership, without showing the privity of the party, since the entry may have been made by a stranger for the purpose of fraud;^l and even against the party

^f *R. v. Mothersell*, 1 Stra. 93; *Thetford case*, 12 Vin. Abr. 90, pl. 16; *R. v. Mayor, &c., of Liverpool*, 4 Burr. 2244; see also *Breton v. Cope*, Peake, C. 43; *Warriner v. Giles*, 2 Stra. 954.

^g *Marriage v. Lawrence*, 3 B. & Ald. 142; E. C. L. R. 5; although the corporation be sued by one of its members; *Hill v. Manchester and Salford Waterworks Company*, 5 B. & Ad. 866; E. C. L. R. 27.

^h *Henry v. Leigh*, 3 Camp. C. 499.

ⁱ *Hunt v. Andrews*, 3 B. & Ald. 341; E. C. L. R. 5.

^j The oaths and declarations required, by 8 & 9 Vict. c. 89, s. 43, to be made by the owners of vessels, and the books of registry themselves, required to be kept by the collectors and comptrollers. may be proved by examined copies or extracts without the attendance of the registering officer, but this does not render them evidence of the facts against third persons; and see 12 & 13 Vict. c. 29. And now by 14 & 15 Vict. c. 99, s. 12, "every register of a vessel kept under any of the acts relating to the registry of British vessels may be proved either by the production of the original or an examined copy thereof, or by a copy thereof purporting to be certified under the hand of any person having the charge of the original;" and "every such register, or such copy of a register, and also every certificate of registry granted under any of the acts relating to the registry of British vessels, and purporting to be signed as required by law, shall be received as *prima facie* proof of all the matters contained or recited in such register when the register or such copy thereof as aforesaid is produced, and of all matters contained or recited in or indorsed on such certificate of registry when the certificate is produced."

^k *Camden v. Anderson*, 5 T. R. 709; 14 East, 229; *Marsh v. Robinson*, 4 Esp. C. 98; *Pirie v. Anderson*, 4 Taunt. 652; *Flower v. Young*, 3 Camp. 240; *Abbott on Shipping*, ch. ii. p. 27.

^l *Tinkler v. Walpole*, 14 East, 226; *Smith v. Fuge*, 3 Camp. 456; *Fraser v. Hopkins*, 2 Taunt. 5; *Teed v. Martin*, 4 Camp. 90; *Cooper v. South*, 4 Taunt.

*311] proved to *have made or authorized the registration, the registry merely proves the legal ownership; and in an action for repairs, the party may prove that he has in fact parted with his interest, and ceased to interfere in the management of the ship.^m On the same principle, a register is not evidence for the defendant to prove a joint ownership on a plea in abatement; nor (without possession) to prove an interest of another person in the ship, in an action brought by an agent on a policy of insurance, describing the interest in that other person; nor to prove that a ship is British built, as described in the register.^p For the same reason, the mere fact of an entry of a stage coach at the licensing office was no evidence of ownership.^q

312] The books in the Heralds' Office, containing the pedigrees of the nobility and gentry of the realm, are evidence on a question of a pedigree; and so are the minute-books of a

802; *Ditchburn v. Spracklin*, 5 Esp. C. 31. In an action for stores furnished for a ship by the captain's order, the register purporting to have been obtained by all the defendants, on the oath of one of them, was held to be *prima facie* evidence to charge them as owners; *Stokes v. Carne, and others*, 2 Camp. 339. In trover for a ship, if the plaintiff produce the original register, and attempt, unsuccessfully, to deduce a title under it, it has been said he cannot afterwards rely upon his possession; *Sherriff v. Cadell*, 2 Esp. C. 617, Kenyon, C. J., 1798.

^m *Curling v. Robertson*, 7 M. & Gr. 336; E. C. L. R. 49; *Young v. Brander*, 8 East, 10; *Jennings v. Griffiths*, Ry. & M. 42; E. C. L. R. 21; *M'Iver v. Humble*, 16 East, 169.

ⁿ *Flower v. Young*, 3 Camp. 240.

^o *Pirie v. Anderson*, 4 Taunt. 652.

^p *Reusse v. Myers*, 3 Camp. 475. See further, as to proof of property in a ship, Vol. II. tit. POLICY.

^q *Strother v. Willan*, 4 Camp. 24; *Ellis v. Watson*, 2 Stark. C. 453; E. C. L. R. 3. But the stat. 5 & 6 Vict. c. 79, by s. 10, provides that a certified copy of the license, which, by s. 11 of 2 & 3 Will. IV. c. 120, is directed to contain, if the Commissioners think proper, the christian and surname, and place of abode, of every proprietor or part proprietor, or person who shall be concerned in the keeping, using, or employing such carriage, shall in all proceedings, and on all occasions whatsoever, be received as evidence against any and every person named in such license of the contents thereof. So, in the case of Metropolitan Hackney Carriages, a certified copy of the entry of the license at the Registrar's shall be evidence and sufficient proof of all things therein registered; and see further 13 & 14 Vict. c. 7, as to these. The stat. 5 & 6 Vict. c. 79, repealed the clause in the statute 50 Geo. III. c. 48, s. 7, which enacted that the name painted on the outside panel of each door of a public stage-coach should be evidence of ownership. This was, not only on summary proceedings before magistrates, but in general, good evidence of proprietorship; *Barford v. Nelson*, 1 B. & Ald. 571; E. C. L. R. 20.

^r *Pitton v. Walter*, Str., 162; Salk. 281; Skin. 623; Yelv. 34; *King v. Foster*,

visitation,^a from which the entries are afterwards made in the books of the Heralds' College.^b In the case of *Pitton v. Walter*,^c a minute-book of a visitation, signed by the heads of several families, and found in the library of Lord Oxford, was received in evidence. But an extract from a pedigree proved to be taken out of the records is not evidence,^d because a copy of the record might be had, and therefore it is not the best evidence.

Armorial bearings are also evidence on a question of pedigree, as tending to show that the person using them was of the family to which they of right belong, his particular branch of that family, what families were allied to it, what members were maidens, widows, &c., and what illegitimate.^e Some officer from the Heralds' College must attend to explain the intention and effect of the different bearings. But as the heralds have exercised very little power since the revolution in restraining the usurpation of another's arms, evidence of armorial bearings used since that period is of little weight.^f

A book of the date of Queen Elizabeth purporting to be *written by an officer of the Duchy of Lancaster, and describing the duties of the office, is not evidence on behalf of a successor claiming to exercise the same rights and duties under an appointment from the duchy, although it has been always kept and referred to as an authority in the Duchy Office.^g [*313

Where a local Act authorized acts to be done at meetings to be called *for that purpose*, and directed that entries in the commissioners' books should be evidence; held, that entries, stating orders

T. Jon. 164-224. A book found therein, purporting to be an account of the possession of property by a monastery, is not evidence of that fact; *Lygon v. Strutt*, 2 Anst. 601.

^a *Sherriff v. Cadell*, 2 Esp. 617; T. Jon. 224; B. N. P. 248.

^b The visitation-books were compiled by the provincial kings-at-arms, who were usually authorized, soon after their investiture in office, by a commission under the great seal, to visit the several counties within their respective provinces, to take survey and view all manner of arms, &c., with the notes of the descents, pedigrees, and marriages of all the nobility and gentry, &c. They occupy the interval between the 21 Hen. VIII. and the end of the reign of Jac. II. See the first report of the House of Commons on the Public Records, p. 82.

^c Str. 162.

^d B. N. P. 248.

^e *Harvey v. Harvey*, 2 W. Bl. 877; Co. Litt. 27; 1 Sid. 354.

^f The first Herald's visitation was in 1528, the last in 1686; Hubback's Evid. of Succession, 696.

^g *Jewison v. Dyson*, 2 M. & Rob. 377.

to have been made at a meeting held by *public notice*, without showing that notice was given of the *purpose* for which it was called, was not sufficient to establish the legality of the meeting.² In order to render the books available, the entries must be made strictly in accordance with the Act, which directs them to be kept,³ but where an Act directed minutes of each meeting to be kept which should be signed by the chairman at each respective meeting, a signature by the chairman on a subsequent day was held to be a sufficient compliance with the requisition of the statute.^b

Land-tax assessments are admissible evidence to show the seisin of the particular person assessed; for it is the duty of the officer to ascertain and charge the occupier.^c And such assessments are admissible, in conjunction with other evidence, to prove the seisin of land by a particular individual, although they contain only the surname generally.^d But such evidence was held to be insufficient to prove the seisin of a particular individual, where it appeared *314] that the assessor had, in the first instance, entered *the name of a former owner incorrectly, and continued it after his death.^e

Books and chronicles of public history are not admissible in order to prove particular facts or customs,^f but they are evidence to prove a matter relating to the kingdom at large, as being the best of which the subject-matter is capable.^g Camden's *Britannia*

² *Heysham v. Forster*, 5 M. & Ry. 277.

³ *Reg v. Mayor of Evesham*, 8 A. & E. 266; E. C. L. R. 35.

^b *Miles v. Bough*, 3 Q. B. 845; E. C. L. R. 43; *Southampton Dock Company v. Richards*, 1 M. & G. 448; E. C. L. R. 39.

^c *Coventry on Conveyancers' Evidence*, c. 7, s. 1, p. 275; *Doe v. Seaton*, 2 Ad. & E. 171; E. C. L. R. 29; *Doe v. Cartwright*, 1 C. & P. 218; E. C. L. R. 12.

^d *Ibid.*

^e *Doe d. Stansbury v. Arkwright*, 2 Ad. & E. 182; E. C. L. R. 29.

^f B. N. P. 248; *Cockman v. Mather*, 1 Barnardist. 14.

^g *Ibid.* 249; Salk. 281. On the impeachment of Warren Hastings, the History of the Growth and Decay of the Ottoman Empire, by Prince Demetrius Cantemir, was received in evidence to prove the customs in Hindostan respecting the treat-

¹ Historical books which have been generally received as authentic are admissible as furnishing evidence of remote transactions; *The Commonwealth v. Alburger, et al.*, 1 Whart 469. G.

But matters of *general history* must be *given in evidence* as well as all other facts and a jury are not to be left to their own information as to such things; *Gregory v. Baugh*, 4 Rand. 611. I.

was rejected on the question, whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town, or in a certain place only.^a And so was Dugdale's Monasticon, on the question, whether the Abbey de Sentibus was an inferior abbey, or not, because the original records might be had at the Augmentation Office.ⁱ It was held, that Dugdale's Baronage was not evidence to prove a descent;^k and books of history are not evidence of the creation of a peerage.^l But in the case of *Neale v. Fry*,^m in order to show that a deed was forged which bore date 1 Philip & Mary, in which all the titles were given to Philip which he used after the surrender of Charles the Fifth, chronicles were admitted to show that he did not take *those titles upon him till six months [315 after the date of the deed. And in the case of St. Katherine's Hospital, Lord Hale admitted a chronicle to prove a particular point of history in the reign of Edward the Third.ⁿ The year-books are evidence to prove the course of the court.^o The history of a particular county is not admissible^p to prove the boundary between two parishes, it being admitted that the latter was coincident with the former.^q

It is a general rule, that whenever the original document is of a

ment of women of rank : and after argument as to the admissibility of the evidence, it was held that the managers were entitled to read it, on the ground that it went to prove an universal custom of the Mohammedan religion ; see Phillips on Evidence, vol. i. 424, citing a report of the proceedings on the impeachment, in the possession of T. Jones Howell, the editor of the State Trials. The point was referred to by Lord Ellenborough, on the trial of General Picton ; 30 How. St. Tr. 492.

^b *Stainer v. The Burgesses of Droitwich*, Salk. 281 ; Skinner, 623 ; 1 Vent. 151.

ⁱ Cited Salk. 281.

^k *Piercy's case*, T. Jon. 164.

^l *Vaux Peerage*, 5 Cl. & F. 526.

^m Salk. 282, and B. N. P. 249.

ⁿ Salk. 282.

^o *Ibid.* ; Spelman's *Nomina Villarum* has been received to prove Newstead to be a vill ; Phillips on Evidence, 605, 8th edit. Bishops Well's *Liber de Ordinationibus Vicariorum* has been admitted to prove an endowment ; *Tucker v. Wilkins*, 4 Sim. 241.

^p *Evans v. Getting*, 6 C. & P. 586 ; El. C. L. R. 25. It was thrown out that the writer might have the same interest as any other inhabitant in extending the boundaries of the county, although the case differed from that of a general history of the country. But it seems the consistory court will receive a county history as evidence of public matters ; e. g. the union of two parishes, since the demolition of the church of one of them ; *White v. Beard*, 2 Curt. Ecc. R. 492.

^q See further as to almanacks, Vol. II. tit. TIME ; corporation books, Vol. II. tit. CORPORATION ; manor books, Vol. II. tit. COPYHOLD—MANOR.

public nature, an exemplification of it, (if it be a record,) or a sworn copy, is admissible in evidence,^{*} because documents of a public nature cannot be removed without inconvenience, and danger of being lost or damaged;^s and the same document may be wanted in two places at the same time.¹ The document must always be proved to be that which it purports to be, and for which it is offered, by some extrinsic proof; as in the case of records, ter-
 *316] tials, &c., by showing that they came from *the legal custody or repository.^t And this is in general sufficient, where

^{*} B. N. P. 394; Gilb. Law of Ev. 5, 6. But though a *copy* of a contract with the land-tax commissioners is made evidence by 42 Geo. III. c. 116, s. 165, the original contract is not evidence by implication; *Burdon v. Rickets*, 2 Camp. 121; and see Sav. 46, pl. 98; Vol. II. tit. PENAL ACTION.

^s Gilb. Law of Ev. 6; Bac. Ab. Ev. F.; and see *Lynch v. Clerke*, 3 Salk. 154; *R. v. Haines*, Comb. 337.

^t See tit. RECORDS—JUDGMENTS, &c.; see also Terriers, *supra*, 292. Several instances have been given in which, by particular statutes, documents are to be taken *prima facie* to be what they purport to be. There are also other instances

¹ In the State Courts, no other authentication of documents from a public office of the United States ought to be required, than such as would be sufficient in the courts of the United States; *Wickliffe v. Hill*, 3 Littell's Rep. 330. But a paper purporting to be a document from the treasury department of the United States certified to be a true copy, but without the official seal, is not evidence. *Ibid*.

By the first section of the statute of the United States, passed March 27th, 1804, "all records and exemplifications of office books, which are kept in any public office of *any State*, not appertaining to a court, shall be proved or admitted in any other court or office in any other State, by the attestation of the keeper of the said records or books and the seal of his office thereto annexed if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the Governor, the Secretary of State, the chancellor or the keeper of the great seal of the State that the said attestation is in due form, and by the proper officer; and the said certificate if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the Governor, the Secretary of the State, the chancellor or the keeper of the great seal, it shall be under the great seal of the State in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the State from whence the same are or shall be taken."

The second section provides that the first section, and the Act of 1790, shall apply to books, records, offices, &c., of the *territories* of the United States, and *countries subject to the jurisdiction* of the United States. M.

the original is produced, for a record proves itself; and terriers and other ancient writings do not usually admit of further authentication.^a

II. *Judicial Documents.*

Judicial documents may be divided into, *First.* Judgments, decrees, and verdicts. *Secondly.* Depositions, examinations, and inquisitions, taken in the course of a legal process. *Thirdly.* Writs, warrants, pleadings, bills, and answers, &c., which are incident to judicial proceedings. With respect to judgments, decrees, and verdicts, may be considered; *first*, their admissibility and effect; *secondly*, the means of proof; *thirdly*, the mode of answering such evidence.

Judgments, Decrees, and Verdicts.—In treating of the admissibility and effect of judgments, decrees, and verdicts, it is important to consider, in the *first* place, for what purpose a verdict or judgment is offered in evidence; whether with a view to establish the mere fact, that such a verdict was given, or judgment pronounced, and those legal consequences which result from that fact; or, *secondly*, with a view to a collateral purpose; that is, not to prove the mere fact that such a judgment has been pronounced, and so to let in all the necessary legal consequences of that judgment, but as a medium of *proving some fact as found by the verdict, or upon the supposed existence of which the judgment is founded. [317]

For establishing the fact that such a verdict has been given, or such a judgment pronounced, and all the legal consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence to prove the fact, but usually conclusive evidence for that purpose; for it must be presumed that the Court has made a faithful record of its own proceedings. And in the next place, the mere fact that such a judgment was given can never be considered as *res inter alios acta*, being a thing done by public authority; neither can the legal consequences of such a judgment be ever so considered; for where the law gives to a judgment a particular operation, that operation is properly shown and demonstrated by means of the judgment, which is no more *res inter alios acta* than the law which gives it force. But with reference to

of a similar rule, but as they are not uniform, and do not depend upon any general principle, they will be noticed in treating of the subjects to which they relate. It is, perhaps, to be desired that a general rule to this effect should be established.

^a For the mode of procuring access to public documents, see tit. *INSPECTION*.

any fact upon whose supposed existence the judgment is founded the proceeding may or may not be, *res inter alios acta*, according to circumstances. For instance, if *B.*, being indicted, being convicted of beating *A.*, the record of the judgment would be incontrovertible evidence of the fact that *B.* had been so convicted; it would be conclusively presumed that the court had kept a faithful record of its own proceedings. It would in like manner be conclusive as to all the legal consequences of such conviction. For instance, one of such consequences is, that *B.* shall not be punished a second time for the same offence; and consequently the record would be conclusive, when shown to the court, to protect him from a second prosecution for the same offence. So if *B.* had been acquitted, and had brought an action against *A.* for a malicious prosecution, it would have been necessary to prove the fact of acquittal; and here again the record would have been conclusive evidence to show that fact. But next suppose, that upon *B.*'s conviction *A.* brought an *318] action to recover *damages for the assault, and offered to prove the assault by the record of conviction, he would then be offering the judgment, not with the view to prove the mere fact of conviction, or to establish any legal consequence to be derived from it, but for a collateral purpose; that is to prove the fact upon whose supposed existence the judgment was founded. With respect to such facts, that is, the facts upon which a judgment professes to be founded, the judgment may or may not be evidence, according to circumstances, considering the nature of the facts themselves, and the parties.^v

A record is in no case direct and positive evidence of any fact which it recites, as having been found by a jury, or otherwise ascertained; it is in the nature of presumptive evidence only, for even the jury who found the fact may have acted upon mere presumption, without the aid of any direct evidence. If, therefore, no rule of policy intervened, no verdict could ever establish any fact conclusively, for it never could prove more than that the jury, in the particular case, presumed, from some evidence or other, that the fact was true. But public policy requires that limits should be opposed to the continuance of litigation upon the same subject-matter, and therefore the law will not permit a matter, which has once been solemnly decided by a court of competent jurisdiction, to be again brought into litigation between the same parties or

^v See B. N. P. 14; *Purcell v. Macnamara*, 9 East, 361.

their representatives.* Consequently a decree or judgment between the *same parties* upon the *same subject-matter* is usually conclusive as to private rights. On the other hand, it is an elementary rule and principle of justice, that no man shall be bound by the act or admission of another to which he was a stranger; and consequently no *one ought to be bound, as to a matter of private right, by a judgment or verdict⁷ to which he was not a party, [*319 where he could make no defence, from which he could not appeal, and which may have resulted from the negligence of another, or may even have been obtained by means of fraud and collusion. Neither ought any one in justice to be bound by a verdict, although he was privy to it, but where his adversary was not also a party, and consequently where the verdict may have been founded upon the evidence of that adversary himself, who had an interest in obtaining a verdict for the purposes of evidence; for as he cannot give direct evidence upon the subject, he ought not to make use of his own evidence by circuitous means.² Another principle which (as it is frequently said) operates to the exclusion of a verdict, as evidence, on a matter of private right, is this, that a person who could have received no prejudice from the verdict, had it been given the contrary way, shall not derive any benefit from it when it turns out to be in his favour,³ and because a judgment operates by way of estoppel, and estoppels must be founded on mutuality.^b

Another ground of objection, even where the evidence is offered against a party to the former proceeding, arises when, from the nature of the former proceeding, the party is not entitled to the same means of disproving the fact, or the same means of redress, of which he might avail himself in the second suit; for this would be virtually, although circuitously, to deprive him of those advantages. Thus, for example, the effect of admitting upon the trial of a civil action, a conviction on an indictment for felony (except for the purpose of establishing a legal consequence of the conviction,) would formerly^c have been indirectly to deprive *the party, against whom the evidence was offered, of the power of [*320

* According to the legal maxims, "nemo vexari debet his pro eadem causa," and "reipublicæ interest ut sit finis litium;" see 3 Wilson, 304, *Kitchen v. Campbell*; see 2 Ex. 681.

⁷ See the judgment of C. J. De Grey, in the *Duchess of Kingston's case*, 20 How. St. Tr. 355.

² Gilb. Law of Ev. 25.

^a *Ibid.* 28.

^b *Per* Lord Ellenborough, 4 M. & S. 479.

^c But now see 6 & 7 Will. IV. c. 114, and 6 Geo. IV. c. 50, s. 60.

repelling the proof by means of a full defence by counsel, and of his attaint of the jury for finding a false verdict.

These objections are however applicable to those cases only where a matter of private right or liability is concerned; for in matters of a public nature, where the proceeding is, as it is usually termed, *in rem*, public convenience requires that the sentence, decree, or judgment should be binding upon all.^d In cases also where the matter is of a public nature, and where reputation would be admissible evidence, a verdict or judgment is frequently evidence, as falling within the scope of general reputation.

Such are the general considerations by which the reception of evidence of this nature is governed, depending mainly on the elementary principles already announced; viz., that no one ought to be bound by any testimony where he has not had the power of cross-examining the witness, and controverting the evidence by opposite testimony,^e nor by any evidence which comes within the description of *res inter alios acta*.

The admissibility and effect of a verdict or judgment is now to be considered, with a view to the proof of the judgment itself *as a fact*, and its *legal consequences*. It seems to be an incontrovertible rule, that every judgment is evidence for such purposes, and the only proper evidence.^f An attainder of felony or treason is, in general, evidence as to all the consequences of the attainder.^g A conviction of the principal for felony is evidence against the accessory.^h A conviction of an infamous crime was, before the change in the law before described, evidence against all, to show the incompetency of the party as a witness.ⁱ So the *judgment
*321] by a person of competent authority is evidence to protect him against actions for any matter judicially done within the scope of that authority.^k For his immunity is a legal consequence of his acting in that situation; and the judgment is offered, not to prove the truth of the facts upon which it is founded, since, with a view to such a defence, the truth of those facts is not material, but in

^d *Vide supra*, p. 36, and tit. RES INTER ALIOS ACTA. But see *Bailey v. Harris*, 12 Q. B. 905; E. C. L. R. 64.

^e *Supra*, tit. EXCLUDING TESTS.

^f *R. v. Bourdon*, 2 C. & K. 366; E. C. L. R. 61.

^g *Vide infra*, tit. ACCESSORY.

^h *Ibid*.

ⁱ *Supra*, tit WITNESS.

^k *Brittain v. Kinnaird*, 1 B. & B. 432; E. C. L. R. 5; *Taylor v. Clemson*, 2 Q. B. 1031; E. C. L. R. 42; *Aldridge v. Haines*, 2 B. & Ad. 408; E. C. L. R. 22 *vide infra*, tit. CONVICTIONS BY JUSTICES, Vol. II.

order to prove the fact of a judgment pronounced by competent authority, and so to establish the immunity of the judge, which is a legal consequence of the judgment.¹ In these, and a number of other instances, where a judgment is admitted to prove the fact itself, and with a view to its legal consequences,^m every such judgment may be considered as operating *in rem*.ⁿ¹

In an action by *A.* against a sheriff, for trespass to his goods, the defendant may give in evidence a judgment against *B.*, and that he, by virtue of a *fiery facias* upon that judgment, seized the goods in question, being the *goods of *B.* So where the title to particular goods is litigated between *A.* and *B.*, it is competent [*322 to *A.* to show a judgment against *C.*, and that the sheriff sold the goods to him, being the goods of *C.*, under a *fiery facias*. A judgment in *assumpsit* against three defendants as partners, is *primâ facie* evidence for one against the others, to prove their liability to contribution.^o And in an action against the sheriff, for an escape or

¹ *Garnett v. Ferrand*, 6 B. & C. 611; E. C. L. R. 13; *Cave v. Mountain*, 1 M. & G. 257; E. C. L. R. 39; *infra*, *ib.* tit. JUSTICES—TRESPASS.

^m Thus a decree of the Court of Chancery, made in Michaelmas Term, 1783, in a suit between the father of the tenant in a writ of right and other persons wholly unconnected with the demandant, brought to establish a will under which the tenant's title arose, by which decree, the court directed that the estates should be considered as belonging to the tenant's father, the devisee, and that he should be let into possession, and have all the title-deeds delivered to him, was admitted, for the purpose of explaining the character in which he took possession of the estate; *Davies v. Lowndes*, 1 Bing. N. C. 606; E. C. L. R. 27; 6 M. & G. 474; E. C. L. R. 46.

ⁿ Thus in *Pritchard v. Hitchcock*, 6 M. & Gr. 151; E. C. L. R. 46, in an action against the surety upon a guarantee, to which the defendant pleaded payment by the principal, it was held that a verdict against the plaintiff by the assignees of the principal, was evidence to show the fact that they had recovered back the money paid by the principal, though it was not evidence that they were entitled to recover it. And see *King v. Norman*, 4 C. B. 884; E. C. L. R. 56. *Supra*, tit. RES INTER ALIOS ACTA.

^o *Powell v. Layton*, 2 N. R. 371.

¹ A judgment may be given in evidence against strangers whenever it is a relevant fact in the title of the party who offers it. Thus where the title is derived from a judicial sale, the judgment or decree may be given in evidence as the authority for the sale; *Barr v. Gratz*, 4 Wheat. 213; *Witmer v. Schlatter*, 2 Rawle, 359; *Jackson v. Wood*, 3 Wend. 27; *Lovell v. Arnold*, 2 Munf. 167; *Fowler v. Savage*, 3 Conn. 90.

A judgment is evidence even for or against strangers to it, of the fact that such a judgment was rendered; *Ansley v. Carlos*, 9 Alabama, 973; *King v. Chase*, 15 New Hamp. 9; *Chamberlain v. Carlisle*, 6 Foster, 540.

other negligence in regard to executions, judgments against third persons are usually given in evidence to show how the plaintiff claims, and his damages.^p So where *A.* has obtained a verdict against *B.* for the negligence of his agent *C.*, in an action by *B.* against *C.*, the recovery in the former action is evidence, not to prove the fact on which it is founded, viz., the negligence of *C.*, but to show how far *B.* has been damnified;^q the judgment here is the best evidence to show the amount of *B.*'s liability to *A.*, but it is no evidence to show that such liability was the consequence of *C.*'s negligence, a fact which must be proved *aliunde*.¹ So a verdict

^p *Per Tindal, C. J., Davies v. Lowndes*, 1 Bing. N. C. 607: E. C. L. R. 27.

^q *Green v. The New River Company*, 4 T. R. 590. But see on a contract to indemnify, *King v. Norman*, 4 C. B. 884; E. C. L. R. 56.

¹ In an action of covenant for quiet enjoyment, a recovery of damages in trespass *quare clausum fregit*, is sufficient evidence to show a breach; *Williams v. Shaw*, Nor. Car. Term Rep. 197. And so the verdict in an action against an officer for a negligent escape, is conclusive evidence of the amount of damages to be recovered by him in an action against the debtor; *Griffin v. Brown*, 2 Pick. 304. But a mere copy of docket entries is not admissible as evidence of a judgment in an action by a surety against his principal to recover the amount paid by him under the judgment; *Levering v. Dayton*, 4 Wash. C. C. Rep. 698. The record of the forfeiture of a recognizance in the proper court is conclusive evidence of the forfeiture in debt on the recognizance; *Shrine v. The Commonwealth*, 2 Rawle, 206. Where in an action of assault and battery the defence was that the plaintiff (a common sailor) had destroyed a quantity of cheese and used insulting language to the master, (the defendant in the suit of assault and battery,) the record of a court of competent jurisdiction of an action brought against the sailor for damages for the destruction of the cheese, in which a verdict had been obtained against him for damages and final judgment thereon, was held inadmissible to prove the fact of such destruction; *Ryer v. Atwater*, 4 Day, 431. G.

In an action by *A.* against *B.* to recover damages for the value of a slave sold by *B.* to *A.*, and which had been recovered by a paramount title by *C.* from *A.* the record of the action between *C.* and *A.* is evidence of the "fact of eviction" and of the damages but not of *C.*'s title; *Sanders v. Hamilton*, 2 Hayw. 226, 282; *Blasdale v. Babcock*, 1 Johns. 517; S. P. A verdict against the sheriff, for the default of his deputy, is evidence in an action by the sheriff against the deputy; *Tyler v. Ulmer*, 12 Mass. Rep. 166; per Parker, C. J. This is doubtless true, as to the amount of damages; and probably if the deputy defend the first suit or have notice of it (which seems to be the ground on which the judge made the above dictum) the verdict would be evidence of the default. Thus in *Kip v. Bringham*, 6 Johns. 158; 7 Johns. 168; where the sheriff, who was sued for an escape of a prisoner to whom the jail liberties had been granted, gave notice of the suit to the prisoner's sureties, and they in conjunction with the sheriff, defended it, and judgment was given against the sheriff; this judgment was held in an action by the sheriff against the sureties on the bond for his indemnity to be conclusive

in a former cause *inter alios* is admissible for the purpose of introducing evidence to show that a witness on the former trial gave evidence directly contrary to that which he gives on the latter.^r So in an action for a malicious prosecution, an indictment against the plaintiff is evidence to show the act done by the defendant in the prosecution of his malicious intention, and also to show the plaintiff's acquittal.^s So a record is frequently evidence by way of inducement, as upon an indictment for perjury,^t or aiding the escape of a felon.^u

*In considering the admissibility and effect of a verdict or judgment, with a view to the proof of those matters on which they are founded, it will be convenient to divide all adjudications into, *First*. Those which relate to *matters of private litigation* between party and party. *Secondly*. Those of a criminal and penal nature. *Thirdly*. Those which relate to proceedings *in rem*. *Fourthly*. Those which relate to matters usually proved by reputation. [*323]

As to the admissibility of a verdict or judgment relating to matters of private litigation between parties.—It has been laid down by great authority, that in civil cases the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea a bar, and as evidence,^x conclusive between the same parties upon the same matter

^r *Clarges v. Sherwin*, 12 Mod. 343; B. N. P. 232.

^s *Legatt v. Tollervey*, 14 East, 302; see Vol. II., tit. MALICIOUS PROSECUTION.

^t *R. v. Iles*, Ca. temp. Hard. 118; *R. v. Hammond Page*, 2 Esp. 649.

^u *R. v. Shaw*, R. & R. 526.

^x Although the celebrated judgment in *The Duchess of Kingston's case* has received frequent sanction from eminent Judges, by whom it has been cited with-

evidence of the escape. A judgment in an action against a sheriff alone, of which his sureties had no notice, is not conclusive as to the amount of damages in a subsequent suit upon the recognizance against the sheriff and sureties jointly; *Carmack v. Commonwealth*, 5 Binney, 154.

The record of a recovery, in ejectment against a covenantor, is not conclusive against a covenantor, if he had no notice of the ejectment; *Leather v. Poultney*, 4 Binney, 356. *Aliter*, if the covenantor had notice and took part in the trial; *Bender v. Fromberger*, 4 Dallas, 436, note; see also *Hamilton v. Cutts, et al.*, 4 Mass. Rep. 349; *Waldo v. Long*, 7 Johns. 173; *Clark's Ex'ors. v. Carrington*, 7 Cranch, 322; *Prewitt v. Kenton*, 3 Bibb. 281; *Radcliffe v. Ship*, Hardin, 292; *Burrill v. West*, 2 N. Hamp. Rep. 190.

It has been decided in South Carolina, that when a recovery over is given by law or secured by express contract, and the plaintiff relies on the recovery against him as the sole and conclusive evidence of his right to recover over, notice of the first action is indispensably necessary; *Bond v. Ward*, 1 Nott & McCord, 201.

directly in question in another court; and that the judgment of a court of *exclusive* jurisdiction is, in like manner, conclusive upon the same matter coming *incidentally*¹ in question in another court, between the same parties for a different purpose. But that the judgment of a court of concurrent or of exclusive jurisdiction is not evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter to be inferred by argument from the judgment.²¹

*324] *This was part of the judgment of C. J. De Grey, in the case of *The Duchess of Kingston*. The principal position amounts to this, that no matter once litigated and determined by proper authority shall a second time be brought into controversy between the same parties.

It is then essential to consider the five following points: the identity of the parties; the identity of the matter litigated; the nature and manner of the adjudication; the application of the adjudication to the fact to be proved; and the effect of the judgment

First, then, as to the identity of the parties.* No one in general

out qualification, it will be seen from the modern authorities below referred to, that in the case where a former judgment is used, not as a decision on the identical subject-matter of complaint, but as a decision on the same controverted point, which is to operate by way of *estoppel*, it cannot so operate unless it be pleaded, even perhaps although the party seeking to avail himself of it had no opportunity for pleading it, as where he is defendant in an ejectment; see *Ferrers v. Arden*, 6 Rep. 7; *Outram v. Morewood*, 3 East, 365, per Lord Ellenborough, C. J.; *Vooght v. Winch*, 2 B. & Ald. 662. But see 2 Smith's L. C. 444, 445.

¹ *Barrs v. Jackson*, 1 Phill. C. Rep. 582.

* By De Grey, C. J., in giving judgment in *The Duchess of Kingston's case*, 20 How. St. Tr. 355, and see the note to this case, 2 Smith's L. C. 436. A verdict is conclusive between the same parties on the same facts, unless it has been reversed by attain; Co. Litt. 227, b. So a defendant, who has omitted to plead his certificate under a commission of bankrupt in a former action by plea *puis darrein continuance*, cannot plead it to an action on the judgment; *Todd v. Maxfield*, 6 B. & C. 105; E. C. L. R. 13. So a shareholder of a bank or company cannot plead to a *sci. fa.* what would have been an answer to the action against their public officer; *Philpson v. Lord Egremont*, 6 Q. B. 587; E. C. L. R. 51.

* Even an infant is bound by a judgment in an action wherein he was a party,

¹ A judgment in a court of exclusive jurisdiction is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment; *Hibshman v. Dulleban*, 4 Watts, 183; *Lentz v. Wallace*, 5 Harris, 412; *Martin v. Gernandt*, 7 Harris, 124; *Society v. Hartland*, 2 Paine C. C. 536.

can be bound by a verdict or judgment unless he be a party to the suit, or be in privity with the party, or possesses the power of making himself a party;¹ for otherwise he has no power of cross-examining the witnesses, or of adducing evidence in furtherance of his rights: whilst the law of attainr subsisted he could have had no attainr, nor can he challenge the inquest, or appeal; in short, he is deprived of the means provided by the law for ascertaining truth and excluding error, and consequently it would be repugnant to the first principles of justice that he should be bound by the result of an inquiry to which he was altogether a stranger.^b

*Hence, if one bring several ejectments against several, [325 upon the same title, a verdict against one is not evidence against the rest, because although the party against whom the ver-

although brought in his name without his knowledge, by his *prochein amy*; *Morgan v. Moore*, 7 M. & W. 400. But the *prochein amy*, who is not "a party," would not be so bound; *Sinclair v. Sinclair*, 13 M. & W. 640.

^b 11 H. 4, 30; Tr. per Pais, 29, 30; 44 Ass. 5; *Kinnersley v. Orpe*, Dougl. 57. Of course, if a person *sui juris* be made a party without his knowledge or consent he is not bound by the judgment; *Robson v. Eaton*, 1 T. R. 62; but his proper course is to apply to set the proceedings aside; *Hubart v. Phillips*, 13 M. & W. 702.

¹ This principle is universally acknowledged. See the following cases in which it has been applied; *Burrill v. West*, 2 N. Hamp. Rep. 190; *Wood v. Davis*, 7 Cranch, 271; *Davis v. Wood*, 1 Wheat. 6; *Paynes v. Coals, et al.*, 1 Munf. 373; *Turpin v. Thomas*, 2 Hen. & Munf. 139; *Jackson v. Vedder*, 3 Johns. 8; *Case v. Reeves*, 14 Johns. 79; *Ryer v. Atwater*, 4 Day, 431; *Killingsworth v. Bradford*, 2 Overton's Rep. 204; *Wood v. Stephens*, 1 Serg. & Rawle, 75; *Estep v. Hutchman*, 14 Serg. & Rawle, 435; *Taber v. Perrott, et al.*, 2 Gallison, 565; *Twambley v. Henley*, 4 Mass. Rep. 641; *Respublica v. Davis*, 3 Yeates, 128; *Johnson v. Brown*, 1 Wash. 187; *Stevellie v. Read*, 3 Wash. C. C. Rep. 274.

A record of one suit cannot be used as evidence in another, on the ground that the defendant and one of the plaintiffs in the latter suit were parties to the former, and that the same point was in controversy in both: another plaintiff and the person under whom both plaintiffs jointly claim, not having been parties to the former suit; *Chapman v. Chapman*, 1 Munf. 398: see *Carmach v. Commonwealth*, 5 Binney, 184.

The record of a judgment against *James R.* is admissible as evidence in an action against *Joseph R.* if it appear that the latter was the same person, and in fact party to the suit and defended it; *Stevellie v. Read*, 2 Wash. C. C. Rep. 274. M.

As to who are parties or privies see *Cleaton v. Chambless*, 6 Rand. 86; *Gardner v. Buckbee*, 3 Cow. 120; *Dennison v. Hyde*, 6 Conn. 508; *Nason v. Blaisdell*, 12 Verm. 165; *Downer v. Morrison*, 2 Gratt. 250; *Putnam Free School v. Fisher*, 34 Maine, 172; *Brock v. Garrett*, 16 Georgia, 487; *Lenox v. Notrebe*, 1 Hempstead, 251; *McClellan v. Kennedy*, 8 Maryland, 236.

dict was had might be relieved, if it was not good, the rest could not.^e So if, in an ejectment between a devisee and the heir-at-law, the defendant should obtain a verdict, on proof that the will was not duly executed, he could not give the verdict in evidence on another ejectment brought by another devisee.^d Where a suit was instituted in the Ecclesiastical Court by *B.* against *C.* for a divorce, *causâ adulterii*, with *D.*, and she pleaded that she was married to *D.*, and upon proof made the court so pronounced, and accordingly dismissed *B.*'s libel, it was held that the judgment was not evidence in an ejectment between other parties, in which the marriage between *C.* and *D.* came in dispute.^e If, in an information against *A.*, issue were taken on the fact whether *J. S.* was mayor of such a borough in such a year, and it were to be found that he was not, such finding and judgment would not be evidence on the like information against *B.*^f So a verdict against a tenant for life will not bind a reversioner;^g for the tenant for life is seised in his own right, and that possession is properly his own. He was at liberty, before the recent change in the law,^h to pray in aid the reversioner or not, and the reversioner could not possibly controvert the matter where no aid was prayed. But if the reversioner had come in *326] upon an *aid-prayer, he might then have had an attaint, and consequently the verdict would then have been evidence against him.ⁱ

^e 3 Mod. 142; *Bell v. Harwood*, 3 T. R. 308; Ld. Raym. 1292; Vern. 415; Ch. Pr. 212; 12 Mod. 319, 339; 10 Mod. 292; Carth. 77, 181; 5 Mod. 386; 2 Jones, 221; and see *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 781; where a judgment in ejectment was refused in evidence, the defendant therein being a stranger to the record.

^d B. N. P. 244.

^e B. N. P. 244, cites *Robin's case*, C. B. 1700; *De Costa v. Villa Real*, Str. 961.

^f B. N. P. 244.

^g B. N. P. 232; Hardr. 462; Yelv. 32.

^h 3 & 4 Will. IV. c. 42.

ⁱ B. N. P. 232; Hard. 462; Yelv. 32. Such a verdict is inadmissible as evidence, not only of the title, but also of any fact found by the jury; thus, in order to prove a private Act of Parliament, which could not be found, there was produced an office copy of a special verdict upon the trial of a feigned issue in Hil. 13 & 14 Car. II., wherein the jury found that in the Parliament of 2 Edw. VI. it was amongst other things enacted in these words following—the Act was then set out, whereby certain lands in Kent including some held by W. T. were dis-gravelled. The lands in question were identified with these. But it was held that the special verdict being *res inter alios acta*, was not admissible; *Doe dem. Bacon v. Brydges*, 6 M. & G. 282; E. C. L. R. 46.

But one who claims *in privity* with another, is in the same situation with the latter as to any verdict or judgment, either for or against him, whether he claim as privy in blood or estate, or as privy in law.^k Accordingly the heir may give in evidence a verdict for his ancestor.^l And a verdict against the ancestor binds the heir.^m So a verdict against an estate or testator binds his representative.ⁿ So in ejectment between *Doe* on the demise of *A.* against *B. A.*, it is said, is bound by a verdict for the defendant. For the courts take notice that in ejectment the lessor of the nominal plaintiff is the party really interested,* and upon the trial *A.* had the opportunity to cross-examine the witnesses for *B.*, and to controvert their testimony.^[327]

^k Such verdict and judgment operate as an estoppel, when pleaded in bar; Com. Dig. Estoppel, B.; Co. Litt. 352; *Vooght v. Winch*, 2 B. & Ald. 662; *Outram v. Morewood*, 3 East, 346; 16 East, 334; *Incedon v. Burgess*, 1 Show, 28; *Hooper v. Hooper*, M'Cle. & Yo. 509. One having lands by escheat, tenant by curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act of law, or in the post, are mentioned by Lord Coke as examples of privies in law; Co. Litt. 352, b. So a husband and wife are bound by a verdict against the wife, as to her estate before marriage; *Outram v. Morewood*, 3 East, 346.

^l *Locke v. Norborne*, 3 Mod. 141; *Outram v. Morewood*, 3 East, 346.

^m *Locke v. Norborne*, 3 Mod. 142; and *R. v. Hebden*, And. 389; *et sic de similibus*, *Blakemore v. Glamorganshire Canal Company*, 2 C. M. & R. 133.

ⁿ *R. v. Hebden*, And. 389.

^{*} Bac. Ab. tit. Ev. F.; B. N. P. 232; Hardr. 472; Gilb. Law of Ev. 33; *Aslin v. Parkin*, 2 Burr. 665; 1 Smith, L. C. 263, and note. It may be doubted whether the older authorities on this subject do not relate to the now obsolete action of *ejectione firmæ*, in which the pleadings were carried on and issue joined as in other ordinary actions of trespass. It has, however, lately been held, that a judgment for the defendant in a former ejectment is evidence for him on a subsequent ejectment, the lessor of the plaintiff being the same; *Doe d. Strode v. Seaton*, 2 C. M. & R. 728; *Doe v. Huddart*, *ib.* 316; and see *Wright v. Tatham*, 1 Ad. & E. 3; E. C. L. R. 28. And, in *Doe v. Wright*, 10 Ad. & E. 763; E. C. L. R. 37; in an action in the name of the nominal plaintiff for mesne profits on and from

¹ There is no privy between an executor or administrator, and the heir or devisee of the deceased; and a judgment against the former is not evidence in an action against the latter to charge the real estate; *Mason's devisees v. Peter's Admrs.* 1 Munf. 437. Whether there is any privy between an executor or administrator and a legatee of the personalty; *Quære, Ibid.* A judgment recovered by an executor is no bar to an action brought by the administrator *de bonis non cum testamento annexo*, for the same cause; *Grout v. Chamberlain*, 4 Mass. 613. There being no privy, the first judgment cannot, at common law, be enforced by the administrator *de bonis non*, but becomes inoperative. By statute 1817, c. 190, § 18, the law in this particular is altered in Massachusetts; see *Allen, Admr., v. Irwin*, 1 Serg. & Rawle, 549.

If several remainders be limited by the same deed, a verdict for one in remainder will be evidence for the next in remainder against the same party.^p But a verdict against a particular tenant for life did not bind the reversioner, unless he came in to defend upon aid-prayer:^q and, consequently, for want of mutuality, a verdict for the tenant for life would not have been evidence for the reversioner unless called in aid against the same party.^r Partly upon *328] the same principle, judgment of ouster against *a mayor is evidence upon a *quo warranto* against one admitted by him.^s

Two plaintiffs brought an action for a diversion of water from their works. One of them, whilst in possession of the same works, had recovered against the same defendants for a similar injury. It was held that this was *prima facie* evidence of privity in estate with the former plaintiff to render the former verdict and judgment admissible in evidence against the defendants;^t and the former verdict and judgment were held to be admissible between them as privies, although those who offered the evidence had been examined in the former suit.^u

But although a verdict and judgment for a party is evidence for one claiming in privity with him, this must be understood of a

10th July, 1826, on a plea that plaintiff was not possessed, a replication that the plaintiff had by verdict recovered a term on a demise laid on that day in an action of ejectment against the defendant, was held good by way of estoppel. But, from *Doe v. Wellsman*, 2 Ex. 369, where, in a similar action, a replication that the plaintiff had recovered a term by a judgment by default upon a demise laid at a later day than that mentioned in the declaration for mesne profits, but including part of the period covered by the term, was held bad, it would seem that at most the estoppel is only upon the point, that on the particular day named in the demise the lessor was entitled to recover, not that he was entitled at any earlier, or any later day.

^p *Pyke v. Crouch*, 1 Ld. Ray. 730; B. N. P. 232; Hardr. 462; *Doe v. Tyler*, 6 Bing. 390; E. C. L. R. 19.

^q B. N. P. 232; Hardr. 436; Bac. Ab. Ev. F.; but see Phillips, 317; Hardr. 472; Gilb. Law of Ev. 35, 36; *Bishop of Lincoln v. Sir W. Ellis*, 2 Gwill. 632.

^r B. N. P. 232, 233; Ca. K. B. 319.

^s B. N. P. 231; 2 Barn. 370; *R. v. Lisle*, And. 163; *R. v. Grimes*, Burr. 2599; 5 T. R. 72; 11 St. Tr. 216; see tit. QUO WARRANTO.

^t *Blakemore v. Glamorganshire Canal Company*, 2 C. M. & R. 133; *Strutt v. Bovingdon*, 5 Esp. 58, 59.

^u *Blakemore v. Glamorganshire Canal Company*, 2 C. M. & R. 139; see also *Brook v. Carpenter*, 3 Bing. 379; E. C. L. R. 11; and Vol. II. tit. MALICIOUS PROSECUTION; see also *Davis v. West*, 6 C. & P. 172; E. C. L. R. 25; where a conviction obtained on the evidence of one defendant was admitted in favour of co-defendants.

claim acquired subsequently to the verdict.^x If a party, after a verdict and judgment against him, assign his interest, the assignee is bound by the verdict. After a verdict against *J. S.* and judgment, *J. S.* aliened to *J. N.*, and it was held that the verdict was evidence against *J. N.*; for it would have been evidence against *J. S.* at the time of the transfer, and the substitute cannot be in a better condition than the principal.^{y 1}

*In ejectment on the several demises of a mortgagor and mortgagee, a judgment in an ejectment brought against the [329 mortgagor after mortgage is not admissible for the lessor of the plaintiff in the former action as against the mortgagee, although the

^x *Doe v. Earl of Derby*, 1 Ad. & E. 787; E. C. L. R. 28; and the rule laid down, Com. Dig. Ev. (A. 5), viz., that a verdict is evidence for one under whom any of the present parties claim, must be so understood. If it could be understood to extend to other lands under the same title previous to the verdict, the effect of such verdict might be carried back to an indefinite extent; *Per Littledale, J.*, 1 Ad. & E. 790; E. C. L. R. 28. So a verdict against a lessor is admissible.

^y 2 Roll. Abr. 680; Bac. Abr. Ev. F. The answer of a Dean and Chapter to a bill filed to establish a farm modus, admitting a district modus, is evidence against a subsequent lessee of the Dean and Chapter in a suit by him for tithe in kind. It is said that a verdict and judgment for or against a lessee is evidence for or against a reversioner; Com. Dig. Ev. (A. 5); Gilb. Law of Ev. 35, 36; *Rushworth v. Countess of Pembroke*, Hardr. 472. This, it seems, is to be understood of a lessee in the old action of *ejectione firmæ*; and see *Rees v. Walters*, 3 M. & W. 527. The proposition from Comyn is at least doubtful.

¹ So where a mortgagor, when sued for possession, defended on the ground of usury, but failed in his defence, and afterwards assigned his right to A. who brought a writ of entry against the mortgagee and attempted to support his action by proof of the usury; the former judgment was held to be a conclusive defence against A.; *Adams v. Barnes*, 17 Mass. Rep. 365. It was also said, by Jackson, J., in the same case, that if in the first suit, the mortgage had been proved to be usurious, the judgment against the mortgagee would have been an estoppel to him and to all persons claiming under him.

In *Outram v. Morewood*, 3 East, 366, Lord Ellenborough questioned the admissibility of the former record, in the case of *Kinnersly v. Orpe*; and in *Case v. Reeves*, 14 Johns. 82; Spencer, C. J., pronounced it to be reconcilable with the rules of evidence, only on the ground that both suits were substantially against the same person. In an action of ejectment between A. & B. the record of a former judgment in an action of trespass between B. and the *cestui que trust* of A. has been admitted in evidence in Pennsylvania; *Calhoun's Lessee v. Dunning*, 4 Dallas, 120.

In Kentucky, no other persons can be considered parties to a suit, so as to be bound by the judgment, but those who appear by the record to be such; and extrinsic evidence is not admissible to prove that persons not named in the record were parties; *Allen v. Hall*, 1 Marsh. 526.

judgment was entered in pursuance of the award of an arbitrator, to whom the cause was referred, there being no evidence to show that the mortgagee took any part in the proceedings.^a

It is not essential that either the parties or the form of action should be precisely the same, if they are substantially the same. Thus in ejectment, as has been seen, the law recognises the real parties.^a Where an action of trover was brought against a creditor and the sheriff, for goods levied under an execution, and the defendants had a verdict, the judgment was held to be a bar to a subsequent action of *assumpsit* against the creditor alone.^b So a verdict for the defendant, in an action for penalties for usury on a bond, was held good evidence for him in an action on the bond as an answer to the plea of usury.^c In an action for a trespass in the *330] plaintiff's fishery,^d a *verdict for the plaintiff in a former action, against one who justified as the servant of *J. S.*, was admitted in evidence against the defendant in the second action, upon its appearing that the defendant in this action had acted by the command of *J. S.*, for it was considered that *J. S.*, was the real party in both actions. But the evidence is not conclusive. So a verdict against one defendant was held to be evidence of the plaintiff's right on a second action against the defendant and two others, who justified under the former defendant for a subsequent injury affecting the same right.^e But a judgment in use and occupation against *A.* and *B.* has been thought not to be evidence, in an action by the same plaintiff for use and occupation of the same premises against *A.*, as it might have been obtained on the admis-

^a *Doe v. Webber*, 1 Ad. & E. 119; E. C. L. R. 28.

^b *Supra*, pp. 326, 327, and n. (o). So in replevin the landlord, or person under whom the defendant made cognizance, was held substantially a party; *Hancock v. Welsh*, 1 Stark. 347; E. C. L. R. 2.

^c *Hitchin v. Campbell*, 2 W. Bla. 827; 3 Wils. 304; see below, p. 333, and the cases there cited.

^d *Cleve v. Powell*, 1 M. & Rob. 228.

^e *Kinnersley v. Orpe*, Dougl. 56. At the trial it was held to be conclusive evidence; but the Court of King's Bench held that it was admissible, but not conclusive; see *Simpson v. Pickering*, 1 C. M. & R. 529; see *Doe v. Earl of Derby*, 1 Ad. & E. 791; E. C. L. R.; and *Outram v. Morewood*, 3 East, 346, *per* Lord Ellenborough. It is not sufficient to show that a party to the former suit might possibly be interested in the subsequent suit.

^f *Strutt v. Bovingdon*, 5 Esp. 56. In Buller's N. P. 40, it is said that a verdict on an issue out of Chancery, to which only one of the defendants was party, may be read against all the defendants, to prove the time of the act of bankruptcy.

sion of *B.*, which might or might not be evidence against *A.*, according to circumstances.^f

A verdict in an action by the vicar against the occupier of land, for tithes, is evidence against another occupier of the same land.^g So a decree in favour of a vicar as to his right to small tithes, against an impropiator, is evidence for his successors;^h and a judgment against the schoolmaster of a hospital, as to rights claimed in respect of his office, is evidence against his successors.ⁱ

A record is also evidence against one who might have been a party to it, for he cannot complain of the *want of those advantages which he has voluntarily renounced.^k [*331

It is a general rule, that a verdict shall not be used as evidence against a man where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be *mutual*.^l This seems to be no more than a branch of the former rule, that to make the judgment conclusive evidence the parties must be the same, for then the benefit and prejudice would be mutual and reciprocal. Where the parties are not the same, one who would not have been prejudiced by the verdict cannot afterwards make use of it, for between him and a party to such verdict the matter is *res nova*, although his title turn upon the same point.^m And the verdict ought not to be admitted to prejudice the

^f *Christy v. Tancred*, 9 M. & W. 438.

^g *Benson v. Olive*, 2 Gwill. 701; *Travis v. Chaloner*, 3 Gwill. 1237.

^h *Carr v. Heaton*, 3 Gwill. 1261; but, as it is said, not conclusive evidence, unless the Ordinary be a party to the first suit.

ⁱ *Lord Brounker v. Sir R. Atkins*, Skin. 15.

^k Bac. Abr. Ev. F.

^l B. N. P. 232, 233; Ca. K. B. 319; Hardr. 472; Bac. Abr. Ev. F.; 4 Maul. & Sel. 479; Co. Litt. 352; 1 T. R. 86; Com. Dig. Estoppel, D.; *R. v. The Warden of the Fleet*, B. N. P. 233; 12 Mod. 337; *Gaunt v. Wainman*, 3 Bing. N. C. 70, E. C. L. R. 32, per Tindal, C. J.; *Doe v. Errington*, 6 Bing. N. C. 83; E. C. L. R. 37. In the case of *Whately v. Menheim and Levy*, 2 Esp. C. 608, Lord Kenyon is said to have held, that a verdict on an issue out of Chancery, to try the question whether *A.* and *B.* were partners, was evidence for a third person in an action against them to prove the partnership. *Sed qu.*, for there was no mutuality; and the verdict might have been obtained on the evidence of the party who afterwards took advantage of it.

^m B. N. B. 232; 3 Mod. 141; Hardr. 472.

¹ Whenever equity would subrogate a second plaintiff to all the rights of the first, the judgment is conclusive of every fact necessarily adjudicated against the defendant who is primarily liable; *Lloyd v. Barr*, 1 Jones, 41.

jury against the former litigant.^a Besides, the former verdict may have *been obtained upon the evidence of the party who *332] afterwards seeks to take advantage of it; and this is one reason why a conviction upon an indictment, which is always at the suit of the king, is not evidence in a civil action.^o¹

From the principles announced, it seems to be a general consequence that a *verdict in a civil proceeding* will not be evidence either against, or for a party *in a criminal proceeding*. The *acquittal* in an action ought not to be admitted as evidence in bar of an indictment, because the parties are not the same, and the king or the public ought not to be prejudiced by the default of a private person in seeking his remedy for an injury to himself; especially as upon the trial of the indictment the testimony of the former plaintiff is admissible, which was before excluded by his being a party to the cause. By such additional evidence the jury may be induced to come to a contrary conclusion.^p Neither, as it seems, is a *verdict for the plaintiff* in a civil action evidence upon an indict-

^a In Gilb. Law of Ex. the principle is thus expounded: But a person that hath no prejudice by the verdict can never give it in evidence, though his title turn upon the same point, because, if he be an utter stranger to the fact, it is perfectly *res nova* between him and the defendant; and if it be no prejudice to the plaintiff, had the fate of the verdict been as it would, he cannot be entitled to reap a benefit; for it would be unequal, since the cause is a new matter between the parties, that the jury should be swayed by any prejudice; for the letting in of pre-judgments supposes that the case has been already decided, and that it is not tried and debated as a new matter, but as the effect of some litigious cross in the defendant, that holds out the possession when the cause has been decided against him; and this ought not to be thrown out upon him on a new inquiry.—The same principle applies to depositions; Hardr. 472.

^o B. N. P. 233; Stra. 68; *Gibson v. Macarty*, Ann. 311; *Bartlett v. Pickersgill*, Burr. 2255; *Smith v. Rummons*, 1 Camp. 9; *Hathaway v. Barrow*, *ibid.* 151. And the rule applies although the judgment was not so obtained; *Blake-more v. Glamorganshire Canal Company*, 2 C. M. & R. 139, *per* Parke, B.

^p *Gibson v. Macarty*, Ca. temp. Hardw. 312; 11 St. Tr. 222.

¹ In an action of slander for charging the plaintiff with stealing certain property, a record of conviction of the plaintiff for stealing the same property was held, in New York, to be admissible *prima facie* evidence to prove a plea of justification of the truth of the words spoken; and it was held that the plaintiff might disprove the larceny, by showing the falsity of the evidence on which the conviction was founded: It was, however, further held that the record of conviction could not be received in evidence at all, if the defendant was a witness in the criminal prosecution; *Maybee v. Avery*, 18 Johns. 352; see *England v. Bourke*, 3 Esp. C. 80; *Cook v. Field*, 3 Esp. C. 133.

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ment;¹ for although the defendant has had the opportunity to cross-examine the witnesses and controvert the testimony of his opponent, yet it would be hard that upon a criminal charge, which concerns his liberty, or even his life, he should be bound by any default of his in defending his property.¹

In addition to this, there is a want of mutuality; the parties are not the same, and the party would, until the recent change in the law, have lost the privilege of proceeding against the jury in case of a false verdict, by attaint. It is also to be observed, that the adjudication in *the civil case would seldom be commensurate with the matter intended to be proved in the criminal [*333 case, since evidence sufficient to render a man responsible in damages may be insufficient to prove that he acted with a criminal intention.

Secondly, as to the identity of the fact. It is essential not only that the parties should be the same, but that the *same fact* should have been in issue in the former cause; for if it was not in issue, the jury could not have been attainted for a false verdict;² nor could a new trial have been had upon it in that cause.

A verdict for the *same cause* of action between the same parties is absolutely conclusive. And the *cause of action* is the same, when the same evidence will support both actions, although the actions may happen to be founded on different writs.² Thus a judgment

¹ 11 St. Tr. 222.

² B. N. P. 233; Hob. 53; *Ricardo v. Garcias*, 12 Cl. & Fin. 368; *Carter v. James*, 13 M. & W. 137.

* *Per* Lord Hardwicke, in *Smith v. Gibson*, R. T. H. 319, there are several cases where a recovery in one action will be a bar to another action of the same nature; but that is where the first recovery is a satisfaction for the very thing demanded by the second action. In an action of trover the plaintiff recovers damages for the thing, and it is as a sale of the thing to the defendant, which vests the property in him, and therefore it is a bar to an action of trespass for the same thing: and therefore it was held, that damages, on a contempt in prohibition, which are recoverable only from the time of the prohibition granted, were no bar to an action for suing the plaintiff in the Admiralty Court, where the Court had no jurisdiction; see *Sparry's case*, 5 Co. 61; Preface to 8 Co., and 6 Co. 7 a; and see Vol. II. tit. RECORD.

¹ In an indictment for forgery in Illinois the court held the record of a civil suit the best evidence to show the amount the defendant intended to defraud the person whose name he forged; *Noble v. The People*, 1 Breese, 29. G.

² *Johnson v. Smith*, 8 Johns. 383; S. P. Thus a judgment for the defendant in trespass *de bonis asportatis* is a bar to an action of assumpsit for the price of the same goods; *Rice v. King*, 7 Johns. 20. In North Carolina it is held that a recovery in trespass is not a bar to an action of detinue, unless the damages in

in trespass will be a bar to an action of trover for the same taking.^t And a verdict in trover will be a bar to an action for money had and received for the sale of the same goods.^u A recovery in trespass at common law varied a writ of ravishment of ward.^v This is the test *334] to know *whether a final determination in a former action is a bar, or not, to the subsequent action; and it runs through all the cases in the books, both in real and personal actions. It was resolved in *Ferrer's case*,^a that where one is barred in any action,

^t Bla. R. 831; Com. Dig. Action, K. 3; see *Carter v. James*, as to different securities for the same debt.

^u *Hitchin v. Campbell*, 2 W. Bl. 827; 3 Wils. 308; see also *Lechmere v. Top-lady*, 2 Vent. 169; 1 Show. 146.

^v Hob. 94; 2 Inst. 202.

^a 6 Rep. 7. *Overton v. Harvey*, 1 L. M. & P. 233. It must be for the same thing, therefore a second action may be brought upon the same agreement for the breach of a different stipulation in it; *Bristowe v. Fairclough*, 1 M. & G. 143; E. C. L. R. 39; *Callander v. Dittrich*, 4 M. & G. 68, E. C. L. R. 43, and a ver-

trespass were given for the property; *Belch v. Holleman*, 2 Hayw. 328. But a recovery in trespass was held, in South Carolina, to be a bar to an action of trover on the ground that in the former action the plaintiff was entitled to damages, not only for the injury done in taking away the goods but the value of them; *Johnson v. Parker*, 1 Nott & McCord, 1.

A recovery against one partner in a printing office for a libel, and satisfaction of the judgment are a bar to an action against the other partner for the same publication; *Thomas v. Rumsey*, 6 Johns. 26. But a mere recovery against one of two or more joint tort-feasors is not, *in general*, a bar to an action against another; the former judgment must have been satisfied; see *Campbell v. Phelps*, 1 Pick. 62; Yelv. 68, note, (Amer. Ed.); *Sheldon v. Kibbe*, 3 Conn. 214; *Hawkins v. Hatton*, 1 Nott & McCord, 318; *Ewing v. Ford*, 1 Marsh. 475; *Wilkes v. Jackson*, 2 Hen. & Munf. 355. M.

In Connecticut a former judgment in a court of competent jurisdiction, in which the *right*, in controversy in a subsequent action, was directly decided between the same parties, is admissible in evidence and conclusive, although the cause of action in the former suit, and the object to be attained by it were different. Therefore when the defendant in an action of ejectment, brought to recover possession of mortgaged premises, set up the defence of usury under the general issue, and the plaintiff to defeat that defence offered in evidence the record of a former judgment, in a suit brought by him on a note for the mortgage debt, to which the defendant pleaded *non assumpsit* with notice of usury, and on that issue a verdict was given and judgment rendered for the plaintiff, it was held that such record was admissible and conclusive against the defence; *Betts v. Starr*, 5 Conn. Rep. 550. I.

See also *Oleaton v. Chambliss*, 6 Rand. 86; *Gates v. Goreham*, 5 Verm. 317; *Shafer v. Stonebreaker*, 4 Gill. & Johns. 345; *Towns v. Nimon*, 5 N. Hamp. 259; *Standish v. Parker*, 2 Pick. 20; *Marsh v. Pier*, 4 Rawle, 273; *Agnew v. McElroy*, 10 Smedes & Marsh. 552; *Gilbert v. Thompson*, 9 Cush. 348.

real or personal, by judgment upon confession, demurrer,^y verdict, &c., he is barred as to that, or the like action of the like nature for the same thing for ever; for *expedit reipublicæ ut sit finis litium*. By actions of the like nature are meant actions of the same degree, and where a writ cannot be had of a higher nature.^z All personal actions are of the same degree:^a but a verdict in a personal action was not a bar to a real action brought in the same right.^b

Where, however, the real merits of the present action have not been at all inquired into in a former proceeding issue may be taken on the fact, if the judgment be pleaded in bar.^c Thus a recovery in one action cannot be *pleaded in bar of a second, where [335 no evidence on the trial of the first action was given in support of the claim on which the second is founded.^d Where issue is dict for defendant on a plea of *lib. ten.* in an action for trespass to plaintiff's close, will not estop the plaintiff in another action, unless it be shown that the trespasses in both actions were committed on the same spot; *Smith v. Royston*, 8 M. & W. 386.

^y But see *Boileau v. Rutlin*, 2 Ex. 665; *Hutt v. Morrell*, 3 Ex. 240.

^z A bar in a writ of aiel was held to be a bar in a writ of besaiei; and in a collateral action, as cosenage; for these are ancestral, and of the same nature; but would not bar a writ of right; 3 Wils. 308; 6 Rep. 7.

^a And, therefore, in an action of trespass for taking a mare, it is a good plea to the writ, that a replevin is pending for the same taking; 3 Wils. 308; 5 Rep. 61, b. And a verdict for the defendant in replevin, upon a plea of *non tenuit* to a cognizance for rent arrear, concludes the plaintiff when sued by the party under whom cognizance was made for the same rent; *Hancock v. Welsh*, 1 Stark. 347; E. C. L. R. 2.

^b See *Outram v. Morewood*, 3 East, 359.

^c *Lepping v. Kedgewin*, 1 Mod. 207; *Hitchin v. Campbell*, 2 W. Bl. 827; 3 Wils. 304. If the suit has been discontinued, or the plaintiff been nonsuit, such judgment is not conclusive; 3 Bla. Com. 296. Withdrawing a juror, or discharging jury by consent, cannot be pleaded as a bar in a second action; *Sanderson v. Nestor*, R. & Moo. 402; E. C. L. R. 21; *Everett v. Youells*, 3 B. & Ad. 349; E. C. L. R. 23. But the court would stay the proceedings in the second action; *Gibbs v. Ralph*, 14 M. & W. 804. A judgment for plaintiff on a plea in abatement for nonjoinder is no bar to another action against the parties not joined; *Godson v. Smith*, 2 Moo. 157; E. C. L. R. 4. So, in cases of appeal on orders of removal, if the order be quashed, but not upon the merits, numerous cases show that the respondent parish may obtain another order; see *R. v. Wheelock*, 5 B. & C. 511; E. C. L. R. 11; *R. v. St. Ann's, Westminster*, 2 Sess. Ca. 525.

^d *Seddon v. Tutop*, 6 T. R. 607. So in the cases of *Ravee v. Farmer*, 4 T. R. 146, and *Golightly v. Jellicoe*, *ib.* in note, it was held that an award made of all matters in difference between the parties was no bar to any cause of action that the plaintiff had against the defendant at the time of the reference, if the plaintiff could prove that the subject-matter of the action was not inquired into before the arbitrator. In the case of *Dunn v. Murray*, 9 B. & C. 780, E. C. L. R. 17, where

*336] taken on *the fact, whether the second action is brought for the same cause of action as the first, evidence is admissible of what passed at the trial.¹

a claim within the scope of a reference to an arbitrator was not brought forward by the plaintiff as a matter in difference, it was held that he could not afterwards make it the subject-matter of a fresh action. And there Lord Tenterden, in giving judgment, referred to that of Lord Ellenborough in *Smith v. Johnson*, 15 East, 213, who laid it down that where all matters in difference are referred, the party, as to any matter included within the scope of such reference, ought to come forward with the whole of his case; and see *Henderson v. Henderson*, 3 Hare, 115. A plaintiff brought debt for rent and for stone taken from a quarry, and before the trial brought another action for improperly quarrying stone, with a count in trover for stone, and delivered bills of particulars for similar quantities of stone; on the first trial he gave no evidence as to the claim for stone, but recovered as to the rest; in the second, he had a verdict for the stone taken away, and it was held by the Court of Exchequer, on a review of the authorities, that the trial was not waived, nor the action barred, by the former recovery; *Hadley v. Green*, 2 Tyr. 390. But if a plaintiff, having several causes of action, offers evidence of some in which he fails, he cannot afterwards bring another action for those causes of action in which he has failed; *per Best, C. J.*, in *Stafford v. Clarke*, 2 Bing. 382; E. C. L. R. 9; see *Hall v. Stone*, 1 Str. 515; *Markham v. Middleton*, 2 Str. 1259; *Todd v. Stewart*, 9 Q. B. 767; E. C. L. R. 58. And if a defendant plead a set-off, though he offers no evidence, and does not in any way attempt to substantiate it, he will be estopped by a verdict on the plea against him from bringing any action for the recovery, *Eastmure v. Laws*, 5 Bing. N. C. 444; E. C. L. R. 35. So if a plaintiff sue in an inferior court for a less sum, having a claim for a larger sum, or having a demand for 60*l.*, consisting of three sums of 20*l.*, consent at Nisi Prius to take a verdict for 40*l.*, he cannot afterwards bring a second action for the residue; *Lord Bagot v. Williams*, 3 B. & C. 235; E. C. L. R. 10; see also *Bowden v. Horne*, 7 Bing. 716; E. C. L. R. 20; to the effect that a *nolle prosequi* as to part of a sum for which interlocutory judgment has been obtained, will bar any action for that part.

* *Seddon v. Tutop*, 6 T. R. 607; *Marten v. Thornton*, 4 Esp. C. 180, where an arbitrator was examined as to the evidence laid before him.

¹ A judgment upon a non-suit, even after hearing upon the merits is no bar to a future action for the same cause; *Bridge et al. v. Sumner*, 1 Pick. 371; *Morgan et al. v. Bliss*, 2 Mass. Rep. 113; *Sed vide, Foster v. Atkinson*, 1 Littell's Rep. 214.

A discontinuance of one action is no bar to another for the same cause; *Hull v. Blake*, 13 Mass. Rep. 155; see also *Sweigart v. Frey*, 8 Serg. & Rawle, 299. It is only where the question between the parties has been once decided upon confession or verdict that the judgment is a bar to another action; and not where the party fails by reason of some technical defect; *Benton v. Cuffy*, Camp. & Nor. 98.

A recovery in a former action apparently for the same cause is only *prima facie* evidence that the demand has been tried, and may be repelled by showing that it is a distinct demand, in relation to which no testimony was offered on the trial of the former cause. But if a claim is submitted to a jury and they disallow it or

It is not, however, necessary that the fact to be proved by the record should have been solely and specifically put in issue on the

allow less than the plaintiff is entitled to recover or overlook part of his demands a verdict and judgment thereon are a conclusive bar to a second action for the same cause; *Phillips v. Berick*, 16 Johns. 136; *Irwin v. Knox*, 10 Johns. 365; *Brockway v. Kenney*, 2 Johns. 210; *Platner v. Best*, 11 Johns. 530; *Snider et al. v. Croy*, 2 Johns. 227; *Whittemore v. Whittemore*, 2 N. Hamp. Rep. 28; *Ryer v. Atwater*, 4 Day, 431. (It is however necessary in order to constitute an estoppel by a former judgment, that the precise point which is to create the estoppel should have been put in issue and decided, and this must appear from the record alone; *Smith v. Sherwood*, 4 Conn. Rep. 276. I.) It is said by Woodbury, J., in *Whittemore v. Whittemore*, *ubi supra*, that the presumption that the demand in a suit is in fact *res adjudicata* may be rebutted in all cases where it has not been the *specific subject* of a former action. Where evidence which is offered to prove one of several demands is rejected by the judge, and the plaintiff suffers a verdict to pass on the whole case, the judgment on that verdict is a bar to a future action on the demand not before proved; *Smith v. Whiting*, 11 Mass. Rep. 445. But "if a person sues upon several and distinct causes of action, and submits only a part of them to the jury he is not precluded from suing again for such distinct cause of action as was not passed upon;" *Wheeler v. Van Houten*, 12 Johns. 313.

If the plaintiff's demand consists of a claim indivisible in its nature, the defendant cannot be vexed by having the claim divided into separate suits; and a judgment in a suit for part of the claim is a bar to a subsequent action to recover the remainder; *Smith v. Jones*, 15 Johns. 229; *Farrington et al. v. Payne*, 15 Johns. 432.

In *Hess's Exor. v. Heeble*, 6 Serg. & Rawle, 57, a former recovery in a suit, in which the plaintiff *counted for an entire sum*, was held to be a bar to another suit brought on the same contract, to recover a sum included in the declaration in the first suit; and the plaintiff was not permitted to show that no evidence was given to the former jury in support of the claim last sued for; see *Lord Bagot v. Williams*, 3 Barnw. & Cressw. 235; *Ingraham v. Hall*, 11 Serg. & Rawle. 78.

Where the payee of a note, on which a payment had been made, but not indorsed, recovered the whole sum apparently due on it, upon the maker's becoming defaulted; the judgment was held in Massachusetts to be no bar to an action by the maker to recover the sum before paid by him; *Rowe v. Smith*, 16 Mass. Rep. 306. *Aliter*, in New Hampshire, 1 N. Hamp. Rep. 33; *Tilton v. Gordon*. So where judgment was obtained by default, upon an account annexed to the writ, in which the defendant was credited for certain goods; it was held that the judgment was no bar to an action against the plaintiff for the same goods, they not having been credited by him at their full value; *Minor v. Walter*, 17 Mass. Rep. 237. But where to an action on a promissory note, upon which partial payments were indorsed the defendant made defence and judgment was finally rendered against him for the amount appearing to be due after deducting the sums indorsed; it was held to be a bar to an action by the defendant to recover the amount of other payments, alleged to have been made on the note, but not indorsed nor allowed, in the former action; *Loring v. Mansfield*, 17 Mass. Rep. 394.

A plaintiff who had brought two actions upon the same articles of agreement

former trial; it is sufficient if it was a fact essential to the finding of that verdict. A verdict against a division of a parish, for not repairing a road, is afterwards (in the absence of fraud, conclusive as to the obligation to repair, although the verdict also involve another fact; viz., that the road was out of repair.^f So a verdict in an action for diverting water from the plaintiff's mill, is evidence in a subsequent action for a similar injury at a subsequent time, as to the right to the water.^g In such case, however, the record would operate as evidence only, and not as an *estoppel*.^h

*337] It is not necessary that the former verdict should have *been founded upon the same precise subject-matter, provided the question be the same, and between the same parties. It is laid down that "it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question; and every matter is *evidence* that amounts to

^f *R. v. St. Pancras*, Peake's C. 219; 2 Saund. 159; 2 Camp. C. 494; see tit. HIGHWAY.

^g *Strutt v. Bovingdon and others*, 5 Esp. 56, although other defendants be joined in the second action to the sole defendant in the first, but who justify under that defendant; *Ibid*.

^h Lord Ellenborough said, that although the former recovery could not be deemed to be a legal estoppel, so as to conclude the rights of the parties by its production, he should think himself bound to tell the jury to consider it as conclusive; 5 Esp. C. 59.

in one of which he had recovered, was held not to be estoppel in the other action, *in which he had declared specially* on the contract, from proving the contract as laid, although it might be inconsistent with the record of recovery in the other action; *Hess v. Heeble*, 4 Serg. & Rawle, 246.

So when there has been a submission of *all demands*, and an award thereon it is held in Massachusetts and New Hampshire that one of the parties may maintain an action upon a particular demand, by showing that it was not laid before the referees; *Webster v. Lee*, 5 Mass. Rep. 334; *Whittemore v. Whittemore*, 2 N. Hamp. Rep. 26. *Aliter*, in New York; *Wheeler v. Van Houten*, 12 Johns. 311. The court in New York, took a distinction (somewhat shadowy) between a submission of "all matters in difference," as in the cases cited in the text, and a submission of "all demands." So in the case of *Johnson v. Smith*, 15 East, 213, Lord Ellenborough "without deciding against the authority of *Golightly v. Jellicoe*," held, Grose and Bayley, Js., concurring, where parties referred "all manner of actions and causes of action" to arbitrators, who awarded a balance to be paid by the defendant to the plaintiff, that on a rule for an attachment for not performing the award, the defendant could not claim a deduction of a certain demand due to him from the plaintiff, on the ground that such demand was no part of the dispute between the parties and had not been submitted to nor taken into the consideration of the arbitrators.

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a proof of the point in question."¹ If the question be the same, it is immaterial whether the parties stand in the same relative position to each other in the second action as in the first; as whether the plaintiff in the first action be plaintiff, or defendant in the second.^k

Where the same party sues, or is sued, in a different capacity, and in a different right, he will not be concluded by the former record. Thus, if a party sue as administrator, and fail, he will not be estopped from maintaining an action against the same defendant as executor.^l So if one claim as heir to his father, he will not be estopped from afterwards claiming as heir to his mother.^m

Thirdly. As to the nature and manner of the adjudication; the judgment, decree, or sentence must be direct upon the precise point, and it is not evidence of any matter which came *collaterally* in question, although it was within the jurisdiction of the court, nor of any matter *incidentally* cognizable, nor of any matter to be inferred by argument from the judgment, as having constituted one of the grounds of that judgment.ⁿ For it *is obvious, [*338 that although the matter expressly adjudicated upon is cer-

ⁱ B. N. P. 232; *Sherwin v. Clarges*, 1700, 12 Mod. 343. It seems, however, that in such a case the verdict would not be conclusive. In Gilb. Law of Ev. 29, the case is put as one of *persuading evidence* to a jury. And see *Cleve v. Powell*, *supra*. So in equity, on a bill filed to have a bill of exchange cancelled and delivered up, upon an allegation that it was given for a gambling debt, a verdict for the plaintiff in equity in an action at law on the bill brought by the defendant in equity, is admissible evidence, *Pearce v. Gray*, 2 Y. & C., Ch. R., 322.

^k *Mondel v. Steel*, 8 M. & W. 858; *Eastmure v. Laws*, 5 Bing. N. C. 444, *supra*; E. C. L. R. 35.

^l *Robinson's case*, 5 Rep. 32.

^m Com. Dig. Estoppel, C.

ⁿ See the opinion of De Grey, C. J., in *The Duchess of Kingston's case*, 20 How. St. Tr. 355; 2 Smith's L. C. 425, *S. C.*; Harg. Law Tracts, 456; 2 Pothier,

¹ If it do not appear from the face of the record in the former suit, it is competent to prove by parol that the same matter did arise in the former suit, and was tried upon the pleadings in the record; *Burt v. Sternburgh*, 4 Cowen, 559. Contra, *Campbell v. Butts*, 3 Comstock, 173.

Parol proof may be given to show the grounds on which a former judgment proceeded, when, from the form of the issue such grounds do not appear by the record itself; provided the matters alleged to have been passed upon be such as might have been given in evidence under the issue joined; *Briggs v. Wells*, 12 Barb. 567; *Birckhead v. Brown*, 5 Sandf. 134; *Gray v. Gillilan*, 15 Illinois, 453; *Chamberlain v. Gaillard*, 2 Ala. 504.

The record of a former recovery apparently for the same cause of action as that which is the foundation of a subsequent suit is *prima facie* evidence only that the

tain, the grounds of the adjudication are often uncertain; and that a particular ground cannot be safely inferred and relied upon, especially where its effect is to be conclusive. To permit this would induce the necessity of unravelling the materials of the former decision; for it would be manifestly unjust to admit a presumption that a particular fact was established upon the former inquiry, and yet not to allow that presumption to be rebutted by proof that it is unfounded. In *Blackham's case*,^o which was an action of trover, the defendant proved that the goods were *Jane Blackham's* in her *339] lifetime, and that he *had administered to her effects. The plaintiff proved that *Jane Blackham* was married to him a few days before her death. The defendant contended that the plaintiff was concluded by the letters of administration granted to himself, since the letters of administration must have been founded upon the presumption that there was no such marriage. But Holt,

by Evans, 357; *Lewick v. Lucas*, 1 Esp. C. 43. Action on the case for unskilfully varnishing engravings: the defendant proposed to give in evidence the record in an action in which he recovered against the present plaintiff for work and labour, and to show by parol evidence that the two actions related to the same work. Lord Kenyon rejected the evidence, because the record was general; and, in order to render a record evidence to conclude any matter, it should appear from the record itself that that matter was in issue; nor should evidence be admitted that under such a record any particular matter came in question. The record in the former action was general; and to inquire whether it was for the work done in varnishing the prints, and whether the defendant in that action had availed himself of the circumstance of their being unskilfully done, would be to try that same case again. (But see as to this *Mondel v. Steel*, 8 M. & W. 858; *Rigge v. Burbidge*, 15 M. & W. 598.) In some instances, however, it is necessary to show by parol evidence to what particular subject-matter a record, general in its terms, was applied; as, for instance, where a defendant pleads a recovery by the plaintiff in a former action for the same subject-matter, and where issue is taken on the question, whether the former verdict embraced the present claim. And where the appellant parish, on a second order, shows that the former order was quashed upon appeal, the respondents may show that it was quashed on the preliminary objection that the pauper was not chargeable; *R. v. Wheelock*, 5 B. & C. 511; E. C. L. R. 11; Vol. II. tit. SETTLEMENT; and see *Reed v. Jackson*, 1 East, 355; *Rex v. Wick St. Lawrence*, 5 B. & Ad. 526; E. C. L. R. 27; *R. v. Knaptoft*, 2 B. & C. 883; E. C. L. R. 9; *Reg v. Sow*, 4 Q. B. 93; E. C. L. R. 45.

^o 1 Salk. 290; 3 Bro. P. C. 2nd ed. 595; *Ibid.* 619. See, as to *Blackham's case*, *Barrs v. Jackson*, 1 Phil. Ch. Rep. 588.

demand had been once tried, and the plaintiffs may repel it by showing that it was a distinct demand, in relation to which no testimony had been offered on the trial in the former cause, and that it arose out of a separate and unconnected transaction; *Brown v. King*, 10 Missouri, 56.

C. J., said, a matter which has been directly determined by the sentence of the proper court cannot be gainsaid; their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary; but that is to be intended only in the point *directly tried*; otherwise it is, if a *collateral* matter be collected or inferred from their sentence, as in this case, because the administration is granted to the defendant; therefore, they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be if the point there tried had been married or unmarried, and their sentence had been, not married. So, although it was once held that the production of the probate by a prisoner indicted for the forging of a will, was conclusive evidence for him,^p the contrary has since been frequently adjudged, and is now settled law.^q So the refusal of letters of administration, on the ground that the applicant was not married to the deceased, is not evidence to disprove the marriage in a court of law.^r And a sentence of excommunication against the father and mother for fornication is not evidence to disprove the legitimacy of the son.^s Letters of administration granted to the plaintiff, as administrator of the goods of *A. B.*, are not evidence of the death of *A. B.*^t So on an appeal against an order of removal, where the respondents relied on a settlement derived from *the pauper's father, and proposed to give in evidence of it an order for the removal of [340 the pauper's brother to the appellant parish, and the examination on which it was founded, which would have shown that the brother's settlement was derived from the father, the court thought the Sessions had properly rejected the evidence on that ground.^u And where, in an action on a bond, the defendant pleaded that there was a usurious agreement between him and the plaintiff, and the bond was given in pursuance thereof, and issue was joined on this last allegation, upon which the defendant had a verdict; it was held in another action between them on the mortgage deed given at the same time, that the plaintiff was not estopped from denying

^p *R. v. Vincent*, Str. 481; *R. v. Rhodes*, *ibid.* 703.

^q *R. v. Sterling*, Leach, 117; *R. v. Buttery and another*, R. & R. C. C. 342; and *R. v. Gibson*, Lancaster, 1802, *cor.* Lord Ellenborough; 2 Evans' Pothier, 356.

^r Rep. term. Hardwicke, 12.

^s *Hilliard v. Phaley*, 8 Mod. 180; and see *Robin's case*, *ante*, p. 325, note (e).

^t *Thompson v. Donaldson*, 3 Esp. C. 63.

^u *Reg v. Sow*, 4 Q. B. 93; E. C. L. R. 45.

that there had been a usurious agreement, no issue having been taken upon that precise point.*

It seems, also, that the former judgment or sentence must not only be direct, but also final^y and *conclusive*^z in the court of which it is a judgment; for if it do not decide the fact there, it cannot have a greater effect in any other court.^a Hence, although a sentence in a jactitation suit *has been admitted in evidence as *341] to the fact of marriage in a temporal court, it seems in principle to be wholly inadmissible.^b And it has been held that proceedings, which would not constitute an estoppel, are not *primæ facie* evidence of the fact.^c A colonial judgment cannot be pleaded in bar of an action in this country, unless it would have been conclusive in the colony, although the judgment has been pronounced by a court of error in the colony, and by the King in Council.^d

* *Carter v. James*, 13 M. & W. 137. But a verdict and judgment are not evidence of immaterial matter involved in the issue; *Shearm v. Burnard*, 10 Ad. & E. 593; E. C. L. R. 37.

^y *Pim v. Curell*, 6 M. & W. 234. Therefore, neither the issue nor the nisi prius record is evidence, where no judgment has been had; *Holt v. Miers*, 9 C. & P. 191; E. C. L. R. 38.

^z See the judgment of C. J. De Grey, 20 How. St. Tr. 355.

^a In *Doe d. Tatham v. Wright*, Lanc. Summer Ass. 1836, *cor.* Coleridge, J., the question was as to the capacity of *M.* to make a will: the defendant, claiming under a supposed will, tendered in evidence a decree in equity dismissing a bill filed by the plaintiff's lessor, to set aside the will on the ground of fraud, and influence exercised by the defendant, also an order to try the issue *devisavit vel non*, the *postea* and verdict finding the *devisavit* with a view to establish the fact of the former jury having so found. Coleridge, J., on a subsequent day, delivered his opinion, that though the decree and *postea* were admissible evidence for the purpose of warranting the admission of the evidence given on the trial of the former issue by witnesses since deceased, those documents were inadmissible to prove the former verdict. The decree, he observed, decides nothing; it is not conclusive: the question is, whether the verdict be admissible in evidence; as matter of opinion the judgment is unnecessary; but it is not contended that it is unnecessary. The judgment, however, decides nothing, and therefore the verdict on which it is founded decides nothing. The verdict is not severable from the decree as a matter of common law decision, because there is no power of reversing the judgment at common law; the admission, therefore, of the former verdict as evidence, would tend only to prejudice the inquiry.

The defendant's counsel afterwards insisted that as the *postea* was evidence for one purpose he had a right to have the whole read, upon which Coleridge, J., thought he was in strictness entitled to have it read, and it was read accordingly.

^b See *The Duchess of Kingston's case*, 20 How. St. Tr. 355.

^c *Wright v. Doe d. Tatham*, 1 Ad. & Ell. 17, 18; E. C. L. R. 28.

^d *Plummer v. Woodburne*, 4 B. & C. 625; E. C. L. R. 10; *Smith v. Nicolls*, 5 Bing. N. C. 222; E. C. L. R. 35.

Neither will a foreign judgment be acted upon where the proceedings are imperfect.^e A decree in a foreign court of equity will not support an action where the amount of the sum due is left indefinite.^f

Fourthly and fifthly, assuming then, that a court of competent jurisdiction has adjudicated directly upon a particular matter, the next question is as to the application and effect of that judgment in proof of the same disputed fact. The adjudication is offered to prove either, first, *the same fact for the same purpose, that is, where the same matter is again litigated^g in a court of [*342 concurrent jurisdiction; or, secondly, to prove the same fact for a different or collateral purpose. In the first case, according to the judgment of C. J. De Grey, already cited,^h the judgment is as a

^e *Obicini v. Bligh*, 8 Bing. 351; E. C. L. R. 21. As to whether a foreign, colonial, or Irish judgment or decree, not *in rem*, is conclusive, see *post*.

^f *Sadler v. Robins*, 1 Camp. 253; and see *Henley v. Soper*, 8 B. & C. 20; E. C. L. R. 15.

^g A judgment by default is not evidence by way of admission, where the same cause is removed to a higher court. Upon the removal, by *habeas corpus*, of the cause from the inferior court, the defendant having suffered judgment by default, it was held that it was not receivable in evidence against him as an admission of a cause of action; upon the removal, both parties were to be considered as in the same situation as if no such judgment had been given; *Bottings v. Firby*, 9 B. & C. 762; E. C. L. R. 17. See *Tidmus v. Lees*, 5 C. & P. 233; E. C. L. R. 24; where Lord Tenterden received such evidence, but the plaintiff was afterwards nonsuited. So a verdict on a former trial is not evidence on a new trial; *Rogers v. Goddard*, 2 Show. 255. But it has been seen that if a party omit to plead that which would have been a bar to the former action, he cannot plead that matter to an action on the judgment; *Todd v. Maxfield*, 6 B. & C. 105; E. C. L. R. 13; and see above, p. 324, note (z); *Henderson v. Henderson*, 6 Q. B., 288, *post*, p. 353; E. C. L. R. 51. After a complaint against the sheriff by motion, and special relief given, an action is not maintainable against him; *Cameron v. Reynolds*, Cowp. 403. A *cessio bonorum* in Scotland does not discharge the party from a contract in England, *Phillips v. Allan*, 8 B. & C. 477; E. C. L. R. 15. *Secus*, if the plaintiff be entitled to a distributive share; *Ibid*. In the case of a joint and several obligation, a judgment and execution without satisfaction against one is no bar; *Lechmere v. Fletcher*, 1 Cr. & M. 623; *Brown v. Wooton*, Cro. J. 73; Com. Dig. Action, L. 4. Two being liable on a contract, the Statute of Limitations runs: one promises to pay his proportion, a joint action is brought against both, a verdict is found against the party so promising, and a verdict on the general issue for the co-defendant; on a second action brought against the former, on the special promise, the verdict and judgment for the co-defendant are no bar; *Lechmere v. Fletcher*, 1 Cr. & M. 623.

^h *Vide supra*, p. 323; 20 How. St. Tr. 355; Hargr. Law Tracts, 456; 2 Pothier, by Evans, 357; 3 Wils. 304.

plea a bar, and as evidence conclusive between the same parties.ⁱ In order, however, to make such a judgment operate as a conclusive bar in a civil action merely as an *estoppel*, it is necessary to *343] plead it as *an estoppel.^k If a party will not rely on an estoppel when he may, but takes issue on the fact, the jury will not be bound by the estoppel, for they are to find the truth of the fact.^l They cannot indeed find anything against that which the parties have affirmed and admitted on record, although such admission be contrary to the truth; but in other cases, though the parties be estopped to say the truth, the jury are not, as in *Godard's case*,^m where, in an action upon a bond to a deceased intestate, the defendant pleaded the death of the intestate before the date of the bond, as alleged in the declaration, and so concluded that the writing was not his deed; on which issue was joined, and it was held that the jury were not estopped from finding that the bond was executed nine months before it bore date, and in the lifetime of the intestate.

In an action on the case for diverting water from the plaintiff's mill, the defendant gave in evidence the record of a judgment in a former action between the same parties for the same cause of action, in which the defendant had pleaded not guilty, and obtained a verdict. It was contended, both at the trial and afterwards in banc, that the plaintiff ought to be nonsuited: but it was held that it *344] *was not conclusive, upon the plea of not guilty, although it would have been so, had it been pleaded by way of estoppel for the defendant had *elected* that the matter should be considered by a jury upon *evidence*, and it was left open to them to

ⁱ B. N. P. 244; Stra. 961; 4 Co. 44; Cowp. 315; 8 T. R. 620; Burr. 1005.

^k Com. Dig. tit. Estoppel, A.; *Outram v. Morewood*, 3 East, 354; 16 East, 334. A plaintiff is estopped by livery of seisin, unless he show by the deed that the delivery was conditional; Co. Litt. 225; Litt. 363. But the jury are not estopped under the general issue; Co. Litt. 226; Litt. 366; see further Vol. II. tit. RECORD. See the Digest, De Exceptione Rei Judicatæ, 44; tit. 1, 2. The judgment not being pleaded is not conclusive, although the form of action was such (ejectment) that the defendant had no election; *Doe dem. Strode v. Seaton*, 2 C. M. & R. 728. But see 2 Smith's Lead. Ca. 444; *Magrath v. Hardy*, 4 Bing. N. C. 782; E. C. L. R. 33; *Dimes v. Grand Junction Canal Co.*, 9 Q. B. 517; E. C. L. R. 58; *Freeman v. Cooke*, 2 Ex. 654.

^l *Vooght v. Winch*, 2 B. & Ald., 662; *Bowman v. Rostron*, 2 Ad. & E. 295; E. C. L. R. 29; *Trevivan v. Lawrence*, Salk. 276; *Hannaford v. Hunn*, 2 Car. & P. 148; E. C. L. R. 12; *Magrath v. Hardy*, 4 Bing. N. C. 782; E. C. L. R. 33.

^m 2 Rep. 4; B. N. P. 296. See *post*, as to admissions on the record.

inquire into the same upon evidence, and to give their verdict upon the whole of the evidence submitted to them. And the case of *Bird v. Randall*,^a where Lord Mansfield was reported to have said that a former recovery need not to be pleaded, but will be a bar when given in evidence, was denied; and it was said that the judgment in a former action for the same cause did not necessarily show that the plaintiff had no cause of action. If the matter had been pleaded it would have operated as an estoppel; but having put it to the jury to find what the fact was, it was inconsistent with the issue which the defendant had joined; to say that the jury were *estopped* from going into the inquiry. He might, however, use the former verdict as evidence, and pregnant evidence to guide the jury who were to try the second cause to a verdict in his favour; but if, notwithstanding the prior verdict and judgment, the jury thought the case was with the plaintiff, they were not estopped from finding the verdict accordingly.¹

^a 3 Burr. 1345.

* *Vooght v. Winch*, 2 B. & Ald. 662. Assuming that the former verdict was founded on evidence as to the right, it is exceedingly difficult to say what degree of weight in the scale is to be attributed by the latter jury to the opinion of the former, without the means of knowing the reasons which led them to that decision, or how far they are to distrust their own judgment, formed on grounds which they do know, in order to embrace that formed on grounds which they do not know. The following observations are taken from Douglas on Contested Elections: "It will be remarked that the evidence of a former verdict is generally (except where it is directly conclusive) cautiously to be received by a jury who are to decide on their own conscientious conviction, and not on that of other men. If there was clear and full proof to guide the opinion of a former jury, another jury will be satisfied with like proof; if the evidence before was doubtful in its nature, no verdict will render it otherwise, while the facts remain the same. Perhaps there is among men in general too great proneness to be prejudiced in matters of fact, and even in points of conscience, by the notions or determinations of others who may have been antecedently so prejudiced themselves, instead of attending to their most solemn duty, when called by the nature of the subject to use their own. On the whole, though the verdict of one jury may be evidence to another, and that verdict may vary in its real force, yet generally it seems to be evidence merely admissible; it is wisely limited by the law within very narrow bounds. In proof of an ancient custom it is very strong." See further, Vol. II. tit. RECORD. In an action for mesne profits, the judgment in ejectment is not, it has been held,

¹ The same doctrine is held in Connecticut and Tennessee; *Church v. Leavenworth*, 4 Day, 274; *Canaan v. Green Woods Turnpike*, 1 Conn. Rep. 1; *Edwards v. McConnell*, Cooke's Rep. 305; but in Virginia, the judgment, in such case, is held to be *conclusive*; *Skelton v. Barbour*, 2 Wash. 64; *Preston v. Harvey*, 2 Hen. & Munf. 55,

*345] *In all cases, however, in considering the effect of the judgment, regard must be had to the extent of the matter actually decided thereby. A conviction of inhabitants of a parish upon an indictment for not repairing a road is conclusive of their liability to repair it; but an acquittal will not establish their non-liability; for, while the conviction is a judgment of their liability to repair, the acquittal merely shows that they were not proved to be then liable to indictment.^p For the same reason, an order of sessions confirming an order of removal is conclusive proof of the pauper's settlement at the date of the first order; but such an order, quashing an order of removal, merely shows that when the latter order was made the appellant parish was not bound to receive the pauper.^q

It seems that an acquittal on an information *in rem* in the Exchequer, would not be conclusive upon strangers in the same manner as a conviction would be.^r

The above general rule, that a judgment by a court of competent jurisdiction upon the same matter, between the same parties, and for the same purpose, is conclusive, appears to comprehend not only all adjudications by the courts of this country, whether of record or not, but also *those of foreign courts.^s It has, *346] indeed been suggested that the judgments of the courts in this country, which are not of record, afford mere *prima facie* evidence of the subject-matter to which they relate, and are liable to be controverted by opposite evidence. This position does not, however, seem to be warranted by any decision, or to be tenable upon principle.

The question, also, whether the judgments of foreign courts, when actions are brought upon them here, are conclusive, or

conclusive in evidence. *Doe v. Huddart*, 3 C. M. & R. 316; see *Bowman v. Rostron*, 2 Ad. & E. 295; E. C. L. R. 29.

^p *R. v. St. Pancras*, 1 Peake, 220.

^q *R. v. Wick St. Lawrence*, 5 B. & Ad. 526; E. C. L. R. 27; 5 B. & C. 511; E. C. L. R. 11.

^r B. N. P. 245; 2 Ph. Ev. 9th ed. 38, 39; S. V. *per Lord Kenyon*, *Cooke v. Sholl*, 5 T. R. 256.

^s See *Sidaway v. Hay*, 3 B. & C. 12, E. C. L. R. 10, where it was held that a debt contracted in England was discharged under a sequestration in Scotland, issued under 54 Geo. III. c. 137. But that was on the construction of the particular statute. See further, *Smith v. Buchanan*, 1 East, 6; *Potter v. Brown*, 5 East, 124; *Pedder v. McMaster*, 8 T. R. 609; *Quin v. Shea*, 2 H. B. 553; *Jeffery v. McTaggart*, cited 3 B. & C. 22; E. C. L. R. 10.

merely *primâ facie* evidence of the debt, has been the subject of considerable doubt, but the former position seems to be best supported both by principle and analogy to decided cases.^{*1} That the evidence in these cases is merely *primâ facie*, is a position which rests chiefly on these authorities: the case of *Walker v. Witter*,[†] which was an action on a judgment in Jamaica, in which it was observed *incidentally*[‡] that courts not of record, or foreign courts, or courts in Wales, have not the privilege of not having their judgments controverted; the case of *Sinclair v. Fraser*,[§] which was an action in Scotland upon a judgment in Jamaica, in which the court required evidence of the original debt, and in which, upon appeal to the House of Lords, it was resolved, that the judgment of a court in Jamaica ought to be received as *primâ facie* evidence of the debt; also a dictum of Eyre, C. J., in giving judgment in the case of *Phillips v. Hunter*^{||} in which he considered foreign judgments as matters **in pais* and *primâ facie* sufficient to raise a promise. [*347 It is to be observed, in the first place, that these authorities are all, with a view to this question, *extra-judicial*. In *Walker v. Witter*, and *Sinclair v. Fraser*, the only question necessary to be determined was, whether, on proof of a foreign judgment in his favour, the plaintiff was entitled to recover against the defendant, without entering into the original consideration on which the judgment was founded; and the question how far such evidence was controvertible did not arise; and the case of *Phillips v. Hunter* was decided against the opinion of Eyre, C. J., by the three other judges. Secondly, the position in *Walker v. Witter*, and the observation of Buller, J., in support of it, in a subsequent case,[¶] proceed upon the supposition that no judgments are conclusive except those of record in this country; and that the judgment of a foreign court could not be entitled to greater credit than the judgment of a court not of record in this country. But this seems to be doubtful at the least. In the case of *Moses v. Macfarlane*,[‡] which **has* been the subject of strong animadversion on account of its ten- [*348

^{*} See *Martin v. Nicolls*, note (r), *post*, page 352; and cases, *post*, p. 353.

[†] 1 Doug. 1.

[‡] See Mr. Evans's observations, 2 Pothier, by Evans, 349.

[§] Cited 1 Doug. 5.

^{||} 2 H. B. 402.

[¶] *Galbraith v. Neville*, 1 Doug. R. 6, n. 2; and 5 East, 475.

[‡] 2 Burr. 1005. *Macfarlane* sued *Moses* in the Court of Conscience, as the

¹ See *Bissell v. Briggs*, 9 Mass. Rep. 462; *Buttrick v. Allen*, 8 Id. 273; *Winchester v. Evans*, Cooke's Rep. 420; *Kelly v. Hooper's Exors.*, 3 Yerger, 395. G.

dency to unsettle foundations,^c the court fully admitted the general doctrine, that the judgment of a competent tribunal could not be overhauled in an original suit; and although the judgment, which was there insisted upon as final, was one by the commissioners in a court of conscience, it was never contended that it was not equally conclusive with the judgment of a court of record. So in *Moody v. Thurston*,^d under an Act for stating the debts of the army, the commissioners had power to call the officers and agents before them, and in case they found money due from one to the other, to give a certificate upon which an action might be brought, as upon a stated account; in an action for money so due, the plaintiff produced his certificate; the defendant tendered his accounts, offering to show that no money was due; and he complained that the commissioners had refused to hear him, and made their certificate upon the first summons, without giving him time to produce his accounts: but the Chief Justice upon the trial, and the whole court afterwards, were of opinion that the certificate was conclusive. So the allowance of a debt by the Commissioners of Bankrupts is conclusive evidence.^e It is true, that in the case of *Henshaw v. Pleasance*,^f it was doubted whether a condemnation by commissioners of excise

indorser of a small bill of exchange, and recovered against him, in breach of an agreement in writing between them (which the commissioners of the court refused to notice), that *Moses* should not be liable nor prejudiced by reason of his indorsement. *Moses* paid the money, and brought an action in the King's Bench to recover it back, as money had and received to his use, and did recover it. The principal question was, whether money thus paid according to the sentence of the court could be recovered in opposition to that sentence, as money had and received to the plaintiff's use; and whether he ought not to have declared for breach of the special agreement. It was held that the plaintiff was entitled to recover, for that the commissioners had properly refused to take notice of the agreement in bar of the suit; and, therefore, that the permitting the plaintiff to recover money so paid, was no impeachment of their decision; and as it was money which, under all the circumstances, was justly due to the plaintiff, it might be recovered in that form of action. This decision has created great dissatisfaction, and the objections to it were stated with great force and perspicuity by Lord C. J. Eyre, in giving his opinion in *Phillips v. Hunter*, 2 H. B. 402, who observed, that it was beyond his comprehension how the same judgment could create a duty for the recoveror, upon which he might have debt, and a duty against him upon which money had and received would lie; see 2 Smith's L. C. 238.

^c See the observations of Eyre, C. J., in *Phillips v. Hunter*, 2 H. Bla. 402; see also *Brown v. McKinnally*, 1 Esp. C. 279; *Marriott v. Hampton*, 7 T. R. 269; Smith's L. C. 237; 2 Pothier, by Evans, 350; *De Medina v. Grove*, 10 Q. B. 152; E. C. L. R. 59.

^d Str. 481.

^e *Brown v. Bullen*, 1 Doug. 407;

^f 2 W. Bl. 1174.

was conclusive evidence in justification of the officer who seized the goods, because it was not a judgment of a court of record. But *in the case of *Roberts v. Fortune*,^s it was held by Lee, C. J., [*349 that such an adjudication, although not of record, was final. So the judgments of the Ecclesiastical Courts^h and Admiralty Courts,ⁱ although not of record, are frequently conclusive.^{1k} So the decision of a private arbitrator, to whom the parties have referred themselves, is binding upon the subject-matter.^{1l} These are instances in which the adjudication, though not of record, is final. A matter is not less *res adjudicata* because it is not of record, that is, because it is not preserved and authenticated in a particular manner; and when it has been established as a legal judgment by a court of competent jurisdiction, it seems to be equally entitled to consideration.^m The principle on *which [*350 the conclusive quality of judgments, decrees or sentences

^s 1 Hargr. Law Tracts, 446.

^h *Da Costa v. Villa Real*, Str. 961.

ⁱ Post Admiralty Decisions.

^k In the case of *Gahan v. Maingay*, cited 2 Evans's Pothier, p. 353, the Lord Chancellor (of Ireland) observed that the Ecclesiastical and Admiralty Courts are not courts of record, and that, sitting in a court of law, he was not at liberty to enter into the examination of the justice or injustice of any judgment of a court of competent jurisdiction, unless it came before him by writ of error.

^l *Doe v. Rosser*, 3 East, 11; *Barrett v. Wilson*, 1 C. M. & R. 586; *Johnson v. Durant*, 2 B. & Ad. 930; E. C. L. R. 22; *Jupp v. Grayson*, 1 C. M. & R. 523.

^m *Stockdale v. Hansard*, 9 A. & E. 62, *et seq.*; E. C. L. R. 36. It will be seen that decisions by justices of the peace by virtue of a summary jurisdiction are conclusive on an action brought, and that the propriety of such decisions cannot be questioned. See Vol. II. tit. JUSTICES. In the case of *Guinness v. Carroll*, 1 B. & Ad. 459, E. C. L. R. 20, an action having been brought upon an Irish judgment, the attempt was made to unravel the former proceedings, but the case was decided on a collateral ground. It is observable, however, that on the case of *Buchanan v. Rucker*, 9 East, 192, being cited as an authority to warrant such inquiry, Lord Tenterden observed, that in that case the proceedings showed that judgment had been given by default upon summonses not personally served, where it did not appear that the defendant ever had been summoned. The cases of *Arnott v. Redfern*, 3 Bing. 353, E. C. L. R. 11, and of *Douglas v. Forrest*, 4 Bing. 686, E. C. L. R. 13, were also cited on the same side. But in the former, Best, C. J., in giving judgment, observed, that it was not necessary to consider whether the judgment (of a Scottish court) could be impeached here; and in the latter, the question was, not whether the former judgment could be examined into with a view to the merits, but only whether the process of the Scotch court, in which the judgment had been pronounced, was sufficient to make the judgment binding on the defendant. In the case of *Barnes v. Winckler*, 2 C. & P. 345, E. C. L. R. 12, the plaintiff having sued for his debt in the county court, and the plaintiff having been dismissed on the merits, it was held that he might still sue in a

depends, applies just as much to foreign judgments attempted to be enforced here, as to any other. Judgments of inferior courts in this country, do not differ in that respect from recorded judgments; and if the mere circumstance of their being foreign made any difference, the objection would equally apply to all foreign judgments and consequently the sentences of foreign courts of Admiralty would not be, as they are, conclusive here. The principle upon which a judgment is admissible at all is, that the point has already been decided in a suit between parties or their privies, by some competent authority, which renders future litigation useless and vexatious. If this principle extends to foreign as well as domestic judgments, as it plainly does, why is it to be less operative in the former than in the latter case? If it does not embrace foreign judgments, how can they be evidence at all? By admitting that such judgments are evidence at all, the application of the principle is conceded. Why, then, is its operation to be limited as if the foreign tribunal had heard nothing more than *ex parte* statement and proof? Lord C. J. Eyre lays stress on the circumstance, that the judgment is voluntarily submitted by the party who claims the benefit of it, to the jurisdiction of the court; but so it is in every case where a party claims the benefit of such a judgment, for no one is compelled to avail himself of a judgment; and it can make
 *351] no difference whether he attempts *to enforce it as plaintiff, or as matter of defence; for it could scarcely be contended that a judgment was merely *prima facie* evidence for a plaintiff who endeavoured to recover the debt, but that it was conclusive in his favour when he used it by way of set-off. In the case of *Galbraith v. Neville*, Lord Kenyon expressed strong doubts as to the doctrine advanced in *Walker v. Witter*; and it appears that ultimately^a the court refused a new trial, being of opinion that the judgment was at all events *prima facie* evidence of debt, without entering into the question how far it was impeachable. In *Houlditch v. Marquis of Donegal*,^o where the creditors of a person resident in Ireland, filed a bill in the English Court of Chancery, and obtained a decree for an account, &c., and afterwards (the property of the debtor lying chiefly in Ireland) filed a bill in the Court of Chancery there, pray-

superior court for the same demand; that the former proceedings would not be conclusive against him, but were for the consideration of the jury, as something might have occurred in the county court which was not brought before the jury in the second action. But see the case of *Huxham v. Smith*, 2 Camp. 19, *infra*, 359.

^a 5 East, 475, n.

^o 2 Cl. & Fin. 470.

ing to have the full benefit of the proceedings in the English suit, the Court of Chancery in Ireland having dismissed such bill as for want of jurisdiction: it was held, upon an appeal to the House of Lords, that the judgment of the Court of Chancery in Ireland was erroneous, that the proceedings in the English Court of Chancery were in the nature of a foreign judgment, and were to be treated as such in Ireland, namely, as *primâ facie* evidence of right in the party who had obtained the judgment, and therefore to be enforced by the court there. It will be observed that in this case the question was not whether the judgment in the English Court was conclusive, or only *primâ facie* evidence, but whether the Irish Court had any jurisdiction in the matter at all. Hence it can hardly be considered as an authority that foreign judgments are merely *primâ facie* evidence, and not conclusive as to the matters decided by them.

Upon an action of covenant,^p for not indemnifying *the plaintiff against partnership debts due from a dissolved firm [352 in which the plaintiff and defendant were partners, the plaintiff proved a decree in the Court of Grenada against himself and the defendant, for a partnership debt, on which a sequestration issued against the plaintiff's property, by which he was compelled to pay the debt. Upon the trial the defendant offered to prove that the account had been incorrectly taken; but Lord Ellenborough rejected the evidence on the ground that the foreign court, being a court of competent jurisdiction, must be taken to have decided rightly; and the Court of King's Bench afterwards refused a rule *nisi* for a new trial. The case of *Burrows v. Jemino*^q is direct to show that foreign judgments are conclusive. In that case the acceptor of a bill, residing at Leghorn, having been discharged of his acceptance, according to the laws there, by the failure of the drawer, instituted a suit there, and had his acceptance vacated by a decree of the court; and being afterwards sued in England upon the same bill, he applied to the Court of Chancery for an injunction, which was granted on the broad ground that the sentence of a court of competent jurisdiction is conclusive.¹

^p *Tarleton v. Tarleton*, 4 M. & S. 20. See *Malony v. Gibbons*, 2 Camp. 502.

^q Str. 733. In the case of *Plummer v. Woodburne*, 4 B. & C. 625, E. C. L. R. 10, it was held that a plea alleging a judgment in a colonial court for the same cause of action, was a bad plea, for not showing that such a judgment would have been conclusive in the colony; but it seems to have been assumed that the judgment, if shown to be conclusive in the colony, would also be conclusive here.

¹ Before the ratification of the confederation of the United States all the courts

*353] In the more recent case of *Martin v. Nicholls*,^r a bill *for a discovery and commission to examine witnesses in Antigua,

^r 3 Sim. 458. This decision has been confirmed in the House of Lords in *Ricardo v. Garcias*, 12 Cl. & F. 368, where to a bill in Chancery, seeking an account respecting a loan transaction, a plea that the plaintiff impleaded some of the defendants before the French tribunals, which gave judgment for them, and that

of the several provinces, colonies or States were at common law deemed to be foreign to each other; and judgments rendered by any one of them, were considered by the others as foreign judgments. Per Parsons, C. J., 9 Mass. Rep. 464, 465. By that ratification the several States agreed that full faith and credit should be given, in each of the States, to the records, acts and judicial proceedings of the courts and magistrates of every other State. Afterwards a similar provision was made in the Constitution of the United States. It seems to have been the intention of the government of the United States to place judgments recovered in any of the State courts, on better ground than judgments rendered in any other country. On any other supposition, the first section of the fourth article of the constitution would seem to be utterly illusory and useless; 7 Cranch, 485, Peter's C. C. Rep. 78; 9 Mass. Rep. 466; Hardin, 413. It must therefore have been the understanding of the framers of the confederation and of the constitution, that when a party to a foreign judgment sought to enforce it by action in the American courts (for in such case only are the merits of a foreign judgment ever re-examined, 3 Johns. 169, per Kent, C. J.,) it was not conclusive evidence; and that the defendant might impeach it. And since the organization of the federal government under the constitution these courts seem uniformly to have had the same understanding of the law. No case has been found in which this point has been *directly adjudicated*; but it is asserted or assumed in the cases above referred to, and in the following among many others, viz.: *Buttrick et ux. v. Allen*, 8 Mass. Rep. 274; *Taylor v. Briden*, 8 Johns. 173; *Hitchcock et al. v. Aicken*, 1 Caine's Rep. 460; *King v. Van Gilder*, 1 Chip. Rep. 59; *Curtis v. Gibbs*, 1 Pennington Rep. 400; *Winchester v. Evans*, Cooke's Rep. 429.

The construction of the above-mentioned clause in the Constitution of the United States in connection with the statute of 1790, has heretofore been contradictory in the different States but whenever a judgment of one State court, when sued in that of another, has been held to be only *prima facie* evidence, it has been on the ground that such judgment is to be regarded as foreign. It may therefore probably be affirmed with safety, that in the United States, a foreign judgment in contradistinction to a judgment of a sister State is not regarded as conclusive, but that the defendant is entitled to the same defence as in the original cause.

Since the decision in *Mills v. Duryee*, 7 Cranch, 481, and *Hampton v. McConnell*, 3 Wheat. 234, it must be considered as settled definitely, that a judgment of one State has the same validity and effect in another as in the State where it was rendered; and that in an action to enforce it, no plea is allowable, which, in a similar action, would be rejected in the latter State. Whether fraud, want of jurisdiction, &c., may be pleaded to such judgment, is still an open question in the Supreme Court of the United States; 3 Wheat. 23; note, 15 Johns. 144. But it has been decided affirmatively in numerous cases in the State courts; *Mitchell v. Osgood*, 4 Greenleaf, 124; see next note.

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in aid of the plaintiff's defence to an action brought on a foreign judgment in this country, was held demurrable, on the broad principle that the grounds of a foreign judgment cannot be reconsidered in the courts of this country.^a In *Henderson v. Henderson*,^b which was an action on a decree of the Supreme Court of Newfoundland, pleas alleging that the plaintiff there sued as widow of *H.* in right of *H.*, without showing any right of representation to him; and also a set-off from *H.* or his estate due to defendant, were held bad, on the ground that these matters would have constituted a defence in the colonial court, and whatever constituted such defence ought there to have been relied on: that in *Smith v. Nicolls* no opinion was intimated that the question decided by the colonial court was open to examination in an action on its judgment here; circumstances might indeed exist which would render it inequitable to claim the sum decreed, but the remedy for that was by application to the Court of Chancery. And so in *The Bank of Australasia v. Nias*,^c which was an action on a judgment obtained in New South Wales, the court held that whatever might have been pleaded to the original action could not be pleaded here. That how far it would be permitted to a defendant to impeach the competency or integrity of a *foreign court, from which there was no appeal, it was unnecessary to inquire, for here there was an appeal, and that was the proper mode of setting aside an erroneous judgment, and not by re-trying the cause and submitting the same questions to a jury.

the matters so adjudicated upon were the same as those put in issue by the bill, was held upon demurrer to be a good answer; and Lord Campbell said, "I was clearly of opinion that a foreign judgment might be pleaded as *res judicata*, because the foreign tribunal has clearly jurisdiction over the matter, and both parties having been regularly brought before the foreign tribunal, and that tribunal having adjudged between them, I think that such a judgment would be a bar to a subsequent suit in this country for the same cause."

^a In *Smith v. Nicolls*, 5 Bing. N. C. 220, E. C. L. R. 35, *Martin v. Nicolls* having been cited, among other authorities, in argument, Tindal, C. J., observed: "Great doubts formerly existed, and some degree of doubt still exists, whether a judgment so recovered is conclusive between the parties, or whether the matter may be opened and agitated in this country." In that case the court held that the original cause of action (trover) was not merged by the judgment of the Court of Sierra Leone; and see the observations in *Houlditch v. Marquis of Donigal*, 2 Cl. & F. 470.

^b 6 Q. B. 288; E. C. L. R. 51. And see *Ferguson v. Mahon*, 11 Ad. & E. 179; E. C. L. R. 39.

^c 20 L. J., Q. B. 284.

Hence it would seem that the decisions of foreign courts, which being apparently regular, and pronounced on matters within the scope of their jurisdiction, are conclusive abroad, are also conclusive in this country; and the court here will presume that the foreign court had jurisdiction,^w and that its proceedings were regular.^x In some instances a foreign judgment is sought to be taken advantage of as a defence;^y if intended to be relied on as an estoppel, it must be pleaded as such;^z for should it merely be given in evidence, it will not be conclusive, however cogent.

Where, however, a foreign judgment has proceeded upon some error apparent on the face of the judgment, it is impeachable on that ground. In the case of *Novelli v. Rossi*,^a the defendant, in answer to proof of a debt due by him to the plaintiff, showed that he had indorsed two bills to the plaintiff, of which the defendant himself was also the indorsee; that the acceptance on these bills had, on presentment for payment, been cancelled by the banker's clerk, who immediately wrote opposite to them, "cancelled by mistake;" that the plaintiff afterwards took up the bills, and returned them regularly protested to the defendant, who applied, without success, to the prior parties for payment; that a suit having been instituted by him in a French court, the court, and afterwards a *355] court to *which the plaintiff had appealed, adjudged that the defendant was discharged from the bills, on the ground that the cancelling of the bills operated as a suspension of the legal remedies against the acceptor, and was equivalent to a delay granted to him by the holder, with whom the plaintiff was identified. It was contended that this decree was conclusive, but the court held, that as it appeared that the French courts had mistaken the law of England as to the effect of the cancellation,^b the defendant was still liable. The courts of England will not, however, for obvious reasons, set aside the judgment of a court of a foreign country, for a mistake of the law of that country, unless the error

^w *Robertson v. Struth*, 5 Q. B. 941; E. C. L. R. 48.

^x *Cowan v. Braidwood*, 1 M. & G. 882; E. C. L. R. 39; *Henderson v. Henderson*, *ubi supra*.

^y *Ricardo v. Garcias*, *ubi supra*.

^z *General Steam Navigation Company v. Guillo*, 11 M. & W. 877. And see also 2 Smith's L. C., notes to *Duchess of Kingston's case*, 449.

^a 2 B. & Ad. 757; E. C. L. R. 22; see also the observations of Lord Ellenborough in *Buchanan v. Rucker*, 1 Camp. 63.

^b As to this point, see also *Raper v. Birbeck*, 15 East, 17; *Wilkinson v. Johnson*, 3 B. & C. 428; E. C. L. R. 10.

be very manifest.^o So if the foreign judgment be contrary to the law of nations it may be impeached;^d and if it be so defective that it is not clear what point, or whether any, was decided, it cannot have any effect as evidence.^e

The proceedings upon which a foreign judgment has been obtained, are also, to a certain extent, open to examination, for the purpose of ascertaining whether the judgment has been fairly obtained, and pronounced by proper authority, in a case within the jurisdiction of the court.

Thus, the judgment is not binding if the court be constituted by persons interested in the matter in dispute.^f So, where the plaintiff declared in *assumpsit* on a foreign judgment in the island of Tobago,^g and upon the trial a copy of the proceedings and judgment was produced, from which it appeared that the defendant had been summoned* by nailing up a copy of the declaration at the court-house door, upon which judgment was afterwards given by defendant, and no evidence was given that the defendant had ever been present in the colony, or subject to the jurisdiction of the colonial court, Lord Ellenborough nonsuited the plaintiff, and a rule *nisi* for a new trial was afterwards refused.^h So in the case of *Cavan v. Stewart*,ⁱ Lord Ellenborough held that a party here was not bound by a colonial judgment, unless it appeared that he had summoned, or it was proved that he had been once resident upon the island; and that it was not sufficient that he was described as an absentee on the face of the proceedings. And in the case of *Ferguson v. Mehon*,^k which was an action of debt upon a judgment of the Court of Common Pleas in

^o *Becquet v. McCartyh*, 2 B. & Ad. 957; E. C. L. R. 22; *Alivon v. Furnival*, 1 C. M. & R. 293. Or unless it be clear that the grounds do not warrant the decision; *Calvert v. Bovill*, 7 T. R. 523; *Pollard v. Bell*, 8 T. R. 434.

^d *Baring v. Clagett*, 3 B. & P. 201; *Wolff v. Oxholm*, 6 M. & S. 92.

^e *Obicini v. Bligh*, 8 Bing. 335; E. C. L. R. 21.

^f *Price v. Dewhurst*, 8 Sim. 279.

^g *Buchanan v. Rucker*, 9 East, 192. And see Lord Tenterden's observation this case in *Guinness v. Carroll*, 1 B. & Ad. 461; E. C. L. R. 20.

^h It appeared that, by a law of the colony, if a defendant be absent from the island, and have no attorney, manager, or overseer there, such mode of summoning should be deemed good service. But the court held, 1st, That the law applied to those only who had once been present upon the island; and, 2ndly, That if its terms could be construed to extend to those who had never been present, the law could not be operative upon them. And see *Douglas v. Forrest*, 4 Bing. 686; E. C. L. R. 13; *Frankland v. McGusty*, 1 Knapp. Pr. C. C. 274; *Obicini v. Bligh*, 8 Bing. 335; E. C. L. R. 21.

ⁱ 1 Stark. C. 525; E. C. L. R. 2.

^k 11 Ad. & E. 179; E. C. L. R. 39.

Ireland, obtained, as it appeared from the defendant's plea, behind the back of the defendant, Lord Denham, C. J., in delivering the judgment of the court, observed, "It was argued, that if the judgment was in fact open to the objection urged upon the plea, it was irregular only, and might have been set aside upon application to the court in which it was recovered; and that we were bound to respect it as a valid judgment, so long as it stood unreversed. This argument puts an Irish judgment, in this respect, on the same footing precisely as a judgment recovered in one of the superior courts of this country; but, although a record for certain purposes, the inquiry is still open, *not indeed into the merits of the action, or the propriety of the decision*, *but whether the judgment passed under
 #357] such circumstances as to show that the court had properly jurisdiction over the party; and when it appears, as here, that the defendant has never had notice of the proceeding, or been before the court, it is impossible for us to allow the judgment to be made the foundation of an action in this country."¹

¹ In the case of *Bissell v. Briggs*, 9 Mass. Rep. 462, Parsons, C. J., says if a foreign judgment be produced by a party, to obtain the execution of it here, the jurisdiction of the court rendering it is still open to inquiry. And if a defect of jurisdiction should appear, the party producing the judgment must fail, without any inquiry into its merits. Neither the federal constitution nor the Act of Congress (1790,) had any intention of enlarging, restraining or in any manner operating upon the jurisdiction of the Legislatures or of the courts, of any of the United States. The jurisdiction remains as it was before; and the public Acts, records and judicial proceedings contemplated and to which full faith and credit are to be given, are such as were within the jurisdiction of the State whence they shall be taken. Whenever, therefore a record of a judgment of any court of any State is produced as conclusive evidence, the jurisdiction of the court rendering it is open to inquiry; and if it should appear that the court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment. And upon the same principle, if a court of any State should render judgment against a man not within the State, nor amenable to the jurisdiction of its courts, if that judgment should be produced in any other State against the defendant, the jurisdiction of the court might be inquired into; and if a want of jurisdiction appeared, no credit would be given to the judgment.

In order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the federal constitution, the court must have had jurisdiction not only of the cause, but of the parties.

A debtor living in one State may have goods, effects or credits in another, where the creditor resides; and such creditor may there attach those goods, &c., pursuant to the laws of that State in the hands of the bailiff, factor, trustee or garnishee of his debtor, and on judgment, those goods, &c., may lawfully be applied to satisfy the judgment. If however those goods, &c., are insufficient to satisfy the judgment,

Irregularity will not, however, be presumed, and the party seeking to obviate the effect of a foreign judgment must clearly show it

and the creditor should sue an action on that judgment in the State where the debtor resides, he must fail; because the defendant was not personally amenable to the jurisdiction of the court rendering the judgment. And if the defendant after the service of the process of foreign attachment, should either in person have gone into the State or constitute an attorney, so as to protect his goods, &c., from the effect of the attachment, he would not thereby have given the court jurisdiction of his person; since the jurisdiction must result from the service of the foreign attachment.

Under the articles of confederation it was decided in Pennsylvania that a judgment obtained by default in a court of another State, without actual notice, and upon a mere nominal attachment of the defendant's property, was not conclusive evidence in a suit on such judgment; *Phelps v. Halker*, 1 Dallas, 261. And in Connecticut, in an action of debt on a judgment similarly obtained, the court, on demurrer, decided for the defendant, on the ground that the court which rendered the judgment had no jurisdiction; *Kibbe v. Kibbe*, Kirby, 119.

And since the adoption of the constitution, it has repeatedly been decided in New York that an action cannot be sustained on a judgment recovered in another State, in a suit commenced by an attachment of goods without any personal summons or actual notice to the defendant such judgment not being even *prima facie* evidence but wholly void; *Kilburn v. Woodworth*, 5 Johns. 37; *Robinson v. Ward's Exors.*, 8 Johns. 86; *Fenton v. Garlick*, 8 Johns. 194; *Pawling et ux. v. Wilson et al.*, 13 Johns. 192; see also *Borden v. Fitch*, 15 Johns. 121, where this subject is very fully discussed. The same doctrine is held in New Hampshire; *Therber v. Blackburne*, 1 N. H. Rep. 242. (And Connecticut, *Aldrich v. Kinney*, 4 Conn. Rep. 380. I.)

A judgment thus obtained in another State is held in Pennsylvania, Kentucky and Vermont to be *prima facie* evidence but subject to inquiry and impeachment; *Betts v. Death*, Addison's Rep. 265; *Rogers v. Coleman, et ux.*, Hardin, 413; see also *Price v. Higgins*, 1 Littell's Rep. 274; *King v. Van Gilder*, 1 Chip. Rep. 59.

In Tennessee, it is held that the decree of a court of equity of another State may be examined and relief afforded, if it appears that the defendant had not proper notice; *Glasgow v. Louther*, Cooke's Rep. 464; see also *Winchester v. Jackson*, 1 Hayw. Tenn. Rep. 316.

In an action in Connecticut on a judgment recovered in Massachusetts, where the defendant pleaded that at the time the former suit was commenced, he was not an inhabitant of Massachusetts, nor resident, nor had property there, the plea was held bad because it did not deny notice; *Smith v. Rhoads*, 1 Day, 168.

It follows perhaps from the construction given by the Supreme Court of the United States to the constitution and to the statute of 1790, that a judgment upon an attachment merely, without actual notice to the defendant, must have the same effect when put in suit in another State, as it has in the State where it is rendered. If in such case, therefore, a judgment thus rendered is, in any State, conclusive only as to the property attached, it can have no greater effect when sued in another State. Whereas, if in any State, such judgment is conclusive as to the

to be contrary to natural justice or defective in itself. Thus in *Henderson v. Henderson*,¹ Lord Denman, C. J., in delivering the judgment of the Court of Queen's Bench, observed, "Several pleas were pleaded to show that the defendant had not had justice done him in the Court of Chancery in New Foundland. This is never to be presumed; but the contrary principle holds, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court, are repugnant to natural justice; and this has been often made the subject of inquiry in our courts. But it steers clear of an inquiry into the merits of the case, upon the facts found; for whatever constituted a defence in that court ought to have been pleaded there." And where a party, once resident in a colony, absented himself from it without leaving any

¹ 6 Q. B. 298; E. C. L. R. 51.

matter decided, and will operate against the person and estate of the defendant generally: or is so far inconclusive, that it may, within a limited term, be opened and examined, upon the performance of certain conditions; the same effect is to be given to it in the courts of other States. And this is the view taken of the subject by Washington, J., in the case of *Green v. Sarmiento*, Peter's C. C. Rep. 74. If the law of any State, says the same learned judge, does not prohibit such an outrage upon the immutable dictates of justice, as the exemption of any judgment from re-examination, which may have been *ex parte*, the defendant having had no opportunity to make his defence, then the court which inadvertently gave the judgment or a superior court would provide the redress: And if the law or the courts should leave the injured party without a remedy, and the courts of another State would be bound to consider such judgment as conclusive (on which question it was not necessary to give an opinion) then the Act of 1790 was not passed with sufficient consideration, and it may and ought to be so amended as to give a conclusive effect to judgments only in cases when the trial was perfectly fair, and when both parties were or might have been heard. *Ibid.*

As nothing can be assigned for error and no averment can be admitted, which contradicts a record, a party to a judgment obtained in another State, in the record of which it is stated that he appeared and pleaded by attorney, cannot successfully plead to an action on that judgment, in another State, that he had no notice of the original suit, and never authorized any person to consent to any proceedings therein. His remedy, if he had no notice is the same (and no other) that would be open to him, if the second suit had been brought in the State where the judgment was rendered; *Field v. Gibbs*, Peter's C. C. Rep. 155. So if the original judgment had been entered by default for non-appearance, upon a false return of the officer. *Ibid.*

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But in *Aldrich v. Kinney*, 4 Conn. 380, it was decided that in an action on a judgment rendered in another State, evidence on the part of the defendant, that he had no legal notice of the suit and did not appear, was held admissible, although the record of such judgment stated that the defendant *appeared by his attorney*.

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attorney, but it was the duty of the procurator fiscal to take care of the interests of an absentee, the judgment was held to be binding.^m *So where an action here on a French judgment, in answer to a plea that the defendant had no notice of the [358 proceedings abroad, and that he was not in France at the time of the accruing of the cause of action, or since, a replication that the claim arose against him as a shareholder in a French company, and being resident in England, he was bound as a shareholder to elect some place as a domicile where to be served with process and notices as a shareholder, and that having elected such place, notice of the proceedings was there served, was held to afford a good answer.ⁿ

Credit also will be given to facts specifically alleged on the judgment: where the judgment (by default) stated that the defendant appeared by attorney, it is to be presumed that he had authority to appear for the defendant.^o¹

^m *Becquet v. McCarthy*, 2 B. & Ad. 958; E. C. L. R. 22. So an action lies on a Scottish judgment of horning against a Scotchman born; *Douglas v. Forrest*, 4 Bing. 686; E. C. L. R. 13. And where the plaintiff declared upon a decree of the Court of Session in Scotland, and the defendant pleaded that he was not at the commencement of the suit, or at any time during the proceedings therein, in Scotland, or within the jurisdiction of the court, nor at any time before pronouncing the decree, according to the course and practice of the court notified, nor did he then know of the proceedings so that he could or might by himself, his proctor, attorney, or agent, appear or plead, or in any way defend himself in the action, nor did he appear to any of the proceedings; but did not allege that he was not born or domiciled in Scotland, or that he was not subject to its laws, or that he had no property there; the plea was held insufficient; *Cowan and others v. Braidwood*, 1 M. & G. 882; E. C. L. R. 39. And see *Russell v. Smyth*, 9 M. & W. 810; *Reynolds v. Fenton*, 3 C. B. 187; E. C. L. R. 54.

ⁿ *Vallee v. Dumergue*, 4 Ex. 290. And see *Bank of Australasia v. Nias*, 20 L. J., Q. B. 284.

^o *Molony v. Gibbons*, 2 Camp. 502.

¹ In an action upon a record of a foreign judgment, showing that there was no service of process, but that the appearance of defendant was entered by an attorney, it is competent to show that the attorney who entered the appearance did so without authority; *Thompson v. Emmert*, 15 Illinois, 415.

Unless the record of a judgment shows on its face, that the court had jurisdiction of the person, the judgment is a nullity; *Steen v. Steen*, 25 Mississippi, 513; *Farmer's Co. v. McKinney*, 6 McLean, 1.

No person is a party to a suit or bound by a judgment therein, without a judicial notice of some sort; *Shaefer v. Gates*, 2 B. Monroe, 453; *Englehead v. Sutton*, 7 How. Miss. 99; *Clark v. Grayson*, 2 Pike, 149.

No State can bind personally, by its judgment, a defendant who is not within its

To make a foreign judgment operate as a bar to the plaintiff's claim, it must appear that it was a final and conclusive judgment.^p

It seems to be a general rule with respect to foreign judgments, which are not unfrequently inaccurately expressed, to regard their substance, and not their form, and this is according to the rule adopted by the Privy Council.^q

The rule (as to examining previous proceedings) appears to be the same with respect to the judgments of inferior courts
*359] in this country. In *Fisher v. Lane*,^r the plaintiff, *an admin-

^p *Don v. Lippmann*, 5 Cl. & F. 21; *Callandar v. Dittrich*, 4 M. & G. 68; E. C. L. R. 43; and see *ante*, p. 352, n. (r).

^q *Per* Lord Tenterden in *Henley v. Soper*, 8 B. & C. 20; E. C. L. R. 15.

^r 3 Wils. 297. So *Tamm v. Williams*, 2 Ch. R. 438; *Bruce v. Wait*, 1 M. &

jurisdiction, and on whom notice has not been served; *Lincoln v. Tower*, 2 McLean, 473.

Where a judgment is brought collaterally before the court as evidence, it may be shown to be void for want of notice to the person against whom it was rendered or for fraud; *Webster v. Reid*, 11 Howard S. C. 437.

An absent defendant is not bound by a judgment in a proceeding against his property, beyond the property in question; *Boswell v. Otis*, 9 Howard S. C. 336.

Where the record omits to state that the court had jurisdiction of the person of the defendant, such jurisdiction cannot be inferred from the judgment. And even when the record does state that the defendant did appear, it seems, that it is competent for him to controvert the fact and to show that he did not appear and was not in a situation to receive notice; *Bradshaw v. Heath*, 13 Wend. 407.

A judgment of a State court, the record of which shows that a defendant had no personal notice and did not appear and submit to the jurisdiction of the court, is not entitled under the constitution and laws of the United States, to full faith and credit in every court within the United States; *D'Arcy v. Ketchum*, 11 Howard S. C. 165; *Rathbone v. Terry*, 1 Rhode Isl. 73; *Thompson v. Emmert*, 4 McLean, 96; *Downer v. Shaw*, 2 Foster, 277.

In a suit against a partnership, if one partner is not within the jurisdiction of the court and is not served with process, and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment against the partnership, cannot be enforced against him out of the local jurisdiction; even though, by the *lex loci*, a service on the partner resident within the jurisdiction, is sufficient to authorize a judgment against all the partners; *Phelps v. Brewer*, 9 Cush. 390.

When a corporation confines its business within the State which chartered it, service of process upon one of its officers accidentally within another State, made under a law of that State sanctioning such service, does not properly give jurisdiction; *Moulin v. Trenton Ins. Co.*, 4 Zabriskie, 222.

Facts on the record necessary to give jurisdiction cannot be controverted; *Lincoln v. Tower*, 2 McLean, 473; *Westervelt v. Lewis*, Ibid. 511.

Matters determined by the record cannot be controverted by plea. But matters extrinsic may be shown, as by pleading fraud, satisfaction or want of jurisdiction in the court rendering the judgment; *Crawford v. Simonton*, 7 Porter, 110.

istrator, brought *assumpsit* for goods sold and delivered by the intestate; the defendant gave in evidence the payment of a sum of money in consequence of a judgment upon a foreign attachment in London. From the minutes of the judgment, it appeared that *Henry Janson* had by this process attached the sum of £92 18s. in the hands of the defendant, for a debt due from the intestate, and for default of the present plaintiff in not appearing, had had execution; but it did not appear from the proceedings that the plaintiff had received any notice of the process, and the serjeant-at-mace stated that such was the custom of the City Court. The Court of Common Pleas held that the judgment was erroneous, since the plaintiff who had never been summoned, had made no default.^a

A judgment and process of execution in a County Court, being pleaded in bar of an action of trespass, it was held that the jury were at liberty to consider the whole of the proceedings fraudulent and collusive, no process having been served, or appearance entered, although a motion to set aside the proceedings of the court below had been made without effect.^b

It is also to be observed, that error or insufficiency, manifest on the face of the proceedings, before courts of inferior jurisdiction, may usually be objected, even where the *conviction of ad- [360] judication is offered in justification of some act done under its authority.^c And the decree of an incompetent court in the time of Queen Elizabeth unknown to the law is inadmissible,

G. 1; E. C. L. R. 39. In *Herbert v. Cooke*, Willes, 36, note (a), it was held that in an action of debt, on a judgment of an inferior court, not of record, the defendant might plead that the cause of action arose beyond the jurisdiction of the court; *Briscoe v. Stephens*, 2 Bing. 213; E. C. L. R. 9; *Stanton v. Styles*, 1 L. M. & P. 575. In *Huxham v. Smith*, 2 Camp. C. 19, Lord Ellenborough held that the judgment against the defendant as garnishee in the Lord Mayor's Court was *prima facie* evidence of a debt on a cause of action within the city of London; but he admitted evidence to prove the contrary. But he held that the judgment was conclusive as to the debt.

^a See also *Williams v. Lord Bagot*, in error, 3 B. & C. 772; E. C. L. R. 10, where it was held that a custom in an inferior court to declare against a defendant before an appearance entered by him, or by some person for him, was bad in law; and it seems also that a custom to issue a summons and attachment at the same time, is also bad.

^b *Thompson v. Blackhurst*, 1 Nev. & M. 266; E. C. L. R. 28.

^c As in the case of a summary conviction before a magistrate; see the cases and recent statute, Vol. II. tit. JUSTICES. It would probably be different in the case of a judgment in a court of record, which, though erroneous, is in force till it is reversed. In *Mann v. Owen*, 9 B. & C. 595, E. C. L. R. 17, the Court of King's Bench investigated the jurisdiction of a court martial.

unless the parties by voluntary submission have given it the effect of an award.^w

Secondly, where a judgment is offered to prove the same fact, but for a different or collateral purpose, then if the judgment was by a court of exclusive jurisdiction, it is *conclusive* evidence upon the question so incidentally arising.^x In an action upon a contract of marriage, *per verba de futuro*, the defendant gave in evidence a sentence of the Spiritual Court in a cause of contract, where the judge had pronounced against a suit for the solemnization in the face of the church, and declared the defendant free from all contract, and this was held to be conclusive evidence although the proceedings were *diveres intuitu*; that in the Spiritual Court being for a specific performance, and that in the action for damages.^y

In the next place, although the judgment or decree be not pronounced by a court of exclusive jurisdiction upon the subject-matter, yet, if the same point once determined between the same parties again arise, although for a different purpose, the judgment, it seems, would be admissible but not conclusive evidence.^z

*An adjudication of a criminal nature has little operation
*361] as evidence, except to prove the mere fact of adjudication, or to establish its own legal consequences.

The principles adverted to seem to exclude a verdict in a criminal proceeding from being evidence in one of a civil nature. For, independently of other objections in such cases, the parties are not the same; and, therefore, there is not such a mutuality as is essential to an estoppel.^a

In an action brought by a private person, the *acquittal* of the defendant upon an indictment is not evidence, because the plaintiff was no party to the criminal proceeding, and therefore his private

^w *Rogers v. Wood*, 2 B. & Ad. 245; E. C. L. R. 22.

^x According to the judgment of De Grey, C. J., *ante*, p. 323. And see *Da Costa v. Villa Real*, Str. 961; and *Stockdale v. Hansard*, 9 Ad. & E. 62, E. C. L. R. 36, where the cases are collected.

^y *Da Costa v. Villa Real*, Str. 961.

^z *Lewis v. Clarges*, Gilb. Law of Ev. 29. A judgment in replevin, on the plea of *non tenuit* to a cognizance for rent arrear, is admissible evidence in an action for rent; *Hancock v. Welsh*, 1 Stark. C. 347; E. C. L. R. 2. Debt on bond, plea usury, the judgment in an action by the defendant against the plaintiff for penalties, is evidence for the plaintiff; *Cleve v. Powell*, 1 M. & Rob. 228; *Pearce v. Gray*, 2 Y. & C., Ch. C. 322.

^a B. N. P. 245; Gilb. Law of Ev. 30; *Hudson v. Robinson*, per Lord Ellenborough, 4 M. & S. 478.

remedy ought not to be concluded by the result.^b In addition to which it may be observed, that an acquittal, however well founded, would seldom, if ever, show conclusively that the defendant had not committed any injury for which he is responsible in damages; for he may be liable in damages without having acted criminally; *e converso*, a conviction upon an indictment is not evidence for the plaintiff in an action for the same wrong: *first*, because the defendant upon the indictment could not have attainted the jury for a false verdict; *secondly*, because there is no mutuality; *thirdly*, because it does not appear that the verdict was not procured by means of the testimony of the opposite party.^c Accordingly, a conviction upon an indictment for trespass is not evidence upon an action brought for the same trespass;^d and a conviction upon an indictment for a *conspiracy was not binding upon the ancient writ of conspiracy by the same party.^e But where, [*362 upon an indictment, the defendant *confesses* his guilt, the confession is evidence in a civil proceeding,^f since those objections do not apply; for the record does not rest upon the testimony of any interested witness; and an attaint must always have been out of the question. It has, indeed, been laid down that a conviction in a court of criminal jurisdiction is conclusive evidence, if the same facts afterwards come collaterally in controversy in a court of civil jurisdiction.^g And, therefore, that the conviction of the father upon an indictment for bigamy would be conclusive in ejectment as to the validity of the second marriage, although an acquittal would be no proof of the reverse. In support of this position no

^b *Supra*, p. 332.

^c In Gilb. Law of Ev. 31, it is urged, that where the verdict is founded on other evidence besides the party's own oath, it is admissible; but how are the jury to know what weight the oath of the party had. It may be questioned whether the reasons founded on the interest of the witness are now at all available.

^d *Sampson v. Toothil*, 1 Sid. 324; B. N. P. 243; *Jones v. White*, Str. 68; *Wilkinson v. Gordon*, 2 Add. 152.

^e 27 Ass. 13; Tr. per Pais, 30. A process long obsolete, and now virtually abolished by the Uniformity of Process Act, 2 & 3 Will. IV. c. 39.

^f Such evidence is warranted by the old authorities. See Lamb. Inst. B. 2, c. 9; 9 H. 6; 60, 11 H. 4, 65; Trials per Pais, 30; 27 Ass. 7. The reason given by Sharde is, that a confession is stronger than a verdict. In such a case, the objection, that the verdict may have been obtained on the evidence of the party who now seeks to take advantage of it, ceases; and the case seems to stand upon the same footing with that of any other admission; and so ruled by Wood, B., Leicester Lent Assizes, 1808. So, *Tiley v. Cowling*, 1 Ld. Raym. 744.

^g B. N. P. 245.

authority is cited except that of *Boyle v. Boyle*;^h but the question there was, whether a prohibition should not be awarded in a jactitation suit, the complainant in that suit having been convicted of bigamy in marrying a second wife, whilst his first wife, the defendant in the jactitation suit, was living; and a prohibition was granted. Admitting this decision to be law, it can scarcely be inferred that the conviction would have been equally conclusive of civil rights in a temporal court. Indeed, where an action was brought for words which charged the plaintiff with felony, it was *363] held that the defendant was at liberty to go *into evidence to prove his guilt, because what had passed between others could not affect him.ⁱ

As a general rule, therefore, a verdict or judgment in a criminal case is not evidence of the fact upon which the judgment was founded in a civil proceeding.

The case of *The King* against *The Warden of the Fleet*^k is a strong authority for this position. The defendant was tried at bar for permitting the escape of prisoners from the Fleet Prison. To prove the escape a witness was offered who had been a prisoner. It was objected that he was incompetent, since he had given a bond for his being a true prisoner, which he had forfeited by his escape; and besides that, he had been retaken; and that if the defendant should be convicted upon his evidence, and debt should afterwards be brought by him upon the bond, the conviction would be evidence to make it void, as taken for ease and favour; and that in an action of false imprisonment for the retaking, the conviction would also be evidence. But it was answered, and resolved by the court, that the conviction would be no evidence against the warden upon debt on the bond, nor for the prisoner in false imprisonment against the warden; because it would not be between the *same parties*. For a conviction at suit of the King for battery, &c., cannot be given in evidence in an action of trespass for the same battery, nor *vice versâ*; the like law of an usurious

^h 3 Mod. 164; Comb. 72, S. C.

ⁱ *England v. Bourke*, 3 Esp. 80; *Cook v. Field*, 3 Esp. 133. An acquittal of a party by the judgment of a court-martial from the charge on which he was arrested, does not deprive the defendant, in an action of trespass for the arrest, of his right to justify, on the ground that there was reasonable and probable cause for the imprisonment; *Bayley v. Warden*, 4 M. & S. 400.

^k 12 Mod. 339; see also the cases of *R. v. Boston*, 4 East, 572; and *Bartlett v. Pickersgill*, *ib.* 577, in which the principle is fully established, that a conviction obtained on the oath of an interested party is of no effect.

contract. In the case of *Hillyard v. Grantham*,¹ upon a trial at bar, the Court of King's *Bench were of opinion that a sentence of excommunication against the father and mother for for- [*364
 nication was not admissible in evidence upon an ejectment to bastardize the issue, because it was a *criminal matter*, and therefore could not be admitted in a civil cause; and also because it was *res inter alios acta*. And in the case of *Gibson v. Macarty*,^m where the question was whether certain promissory notes were genuine, the defendant offered in evidence the record of the plaintiff's conviction for the forgery of one of the notes; but Lord Hardwicke refused to admit the evidence, on the ground suggested by the plaintiff's counsel, viz., that no record of a conviction could be evidence in a civil suit, because it might have been obtained by the evidence of a party interested. And the same doctrine is reported to have been expounded by the court in the case of *Richardson v. Williams*.ⁿ In the case of *The King v. Boston*,^o decided while the law excluded the *testimony of an interested wit- [*365
 ness, it was held, on an indictment for perjury, assigned upon an answer to a bill of injunction, that the prosecutor, against whom the defendant had brought the action at law, was a competent witness, on the express ground that the conviction could not be used by him for the purpose of obtaining relief in equity.

The main object to the reception of such evidence is that there

¹ Cited Ca. temp. Hard. 311.

^m Ca. temp. Hard. 311.

ⁿ 12 Mod. 319; and see *Jones v. White*, Str. 68, where the question was, whether upon the issue *devisavit vel non*, the coroner's inquest, finding the deceased a lunatic, was admissible in evidence; and the Judges were divided upon the question of admissibility. But Eyre and Pratt, Js., were for excluding the evidence, because the proceeding was of a criminal nature, and therefore was not admissible in a civil proceeding. And the Chief Justice, and Powys, J., thought it admissible, on the special ground, that since the plaintiff was executrix, the inquest which saved the personal estate was to her advantage; and see *R. v. Bowler*, Vol. II. tit. WILL. See also *Hathaway v. Barrow*, 1 Camp. 151, where Sir J. Mansfield held, that in an action on the case for a conspiracy, a conviction of the defendants upon an indictment, where the plaintiff was a witness, was not evidence. A conviction was not evidence for the informer, though his name did not appear on the face of the proceedings; *Smith v. Rummens*, 1 Campb. 9; S. P. ruled in *Hathaway v. Barrow and others*, 1 Campb. 151; see also *Burdon v. Browning*, 1 Taunt. 520; *Richardson v. Williams*, 12 Mod. 319; *Gibson v. M'Carty*, Cas. temp. Hardw. 311; *Hillyard v. Grantham*, cited by Lord Hardwicke in *Brownword v. Edwards*, 2 Ves. 246.

^o 4 East, 572; see also *Bartlett v. Pickersgill*, 4 East, 577; *Burdon v. Browning*, 1 Taunt. 520.

would be no mutuality; for an acquittal of a party on a criminal proceeding would not be available in a civil action.^p Where the father was acquitted on an indictment for having two wives, it was held that the record was not evidence in a civil case, where the validity of the second marriage was controverted.^q On this ground it is asserted in Buller's *Nisi Prius*,^r that a conviction at the suit of the King for a battery, cannot be given in evidence in trespass for the same battery.

The record of an acquittal or conviction upon a criminal charge, *366] is in general pleadable in bar, or conclusive evidence* upon another indictment or other proceeding for the same offence. The parties are the same in both, and no one ought to be brought into jeopardy twice for the same charge.^s Upon this ground it has been held, that a person who had killed another in Spain, and had been tried and acquitted by a competent tribunal there, could not be tried again here for the same offence.^t

From the nature of the proceeding an acquittal upon an indictment for the non-repair of a road, is not conclusive evidence upon a subsequent indictment as to any particular point, since it concludes nothing as to the general liability, but only shows that the defendant was not liable at the particular time laid in the former indictment.^u But a *conviction* in such case is conclusive as to the

^p Gilb. Law of Ev. 35; B. N. P., 232, 233; see Lord Ellenborough's observations, *Hudson v. Robinson*, 4 M. & S. 479; 12 Mod. 339; Hardr. 472; 11 St. Tr. 462; Bac. Abr. Ev. F. In *Blakemore v. The Glamorganshire Canal Company*, 2 C. M. & R. 139, Parke, B., observed as to the cases cited, that the Judges, in noticing the objection to the reception of such evidence, that the verdict might have been obtained upon the evidence of the party seeking to avail himself of it, were only assigning one reason which existed in the particular cases, instead of relying on the general principle. An estoppel is always reciprocal; *Gaunt v. Wainman*, 3 Bing. N. C. 69; E. C. L. R. 32; Gilb. Law of Ev. 28; B. N. P. 232.

^q The reason assigned for this is, that less evidence is necessary to maintain the action than to attain the criminal, and therefore his acquittal was no argument that the fact was true; Gilb. Law of Ev. 33.

^r P. 233. So a conviction of an assault before a magistrate, on the information of the party assaulted, is not evidence in an action for the assault; *Smith v. Rummens*, 1 Camp. 9; see also *Hathaway v. Barrow*, 1 Camp. 151; 1 Taunt. 520. But under the statute 9 Geo. IV. c. 31, s. 27, 29, a certificate of acquittal, or the conviction and paying the penalty or suffering the punishment, will bar the action.

^s 4 Co. 40; see B. N. P. 243; 1 Sid. 325.

^t *Hutchinson's case*, 1 Show. 6; B. N. P. 245; see Vol. II. tit. FOREIGN LAW.

^u Gilb. Law of Ev. 32; B. N. P. 245; *R. v. Burbon Inh.* 5 M. & S. 392; per Lord Kenyon, *Rex v. St. Pancras*, Peake, C. 220.

liability, unless fraud can be shown.* The record of a conviction was in one case said to be conclusive evidence against the inhabitants of a particular district of their obligation to repair a road, unless they can show that it was obtained by fraud.⁷ But fraud is there put by way of example only,⁸ for as against the parish at large the judgment is inconclusive, if the defence was conducted by the inhabitants of a particular district in which the indicted road lay, without any notice to the rest of the *parish.^a So [367 upon an indictment against a parish consisting of several districts, one of which pleaded a custom for the inhabitants of each of the three districts to repair their own roads, independently of each other, which custom was traversed, the prosecutor having upon the trial proved records of conviction of the parish at large (upon not guilty pleaded) for not repairing roads lying in the particular districts; the defendants were permitted to adduce evidence that such pleas were pleaded without their knowledge.^b

The record of a judgment in a criminal, (as in all other cases,) is in general conclusive evidence as to the fact of the conviction and judgment, and as to all legal consequences resulting from it.

A judgment in a criminal proceeding is in the nature of a judgment *in rem*; such a judgment standing unreversed is conclusive evidence as to all its consequences, although with some exceptions. Thus an accessory to a felony, notwithstanding the judgment against his principal, is entitled to controvert his guilt. In this case, although the conviction of the principal may be alleged in the indictment against the accessory;^c it is in effect but *prima*

* Although a conviction in a court of criminal jurisdiction is conclusive evidence of the fact, if it come collaterally in controversy in a court of civil jurisdiction, yet an acquittal does not prove the reverse, because it does not ascertain the facts; *per Buller, J.*, B. N. P. 245

⁷ *R. v. St. Pancras*, Peake, C. 220. Note, that Lord Kenyon held it in the above case to be conclusive on an indictment against another parish. The question, however, was between the indicted parish and the parish of Islington, the convicted parish.

⁸ See the note, 2 Saund. 159 (a); see also *R. v. Eardisland*, 2 Camp. 494.

^a Doug. 421, 3rd edit.; *R. v. Townsend*, *R. v. Leominster*; see 2 Wms. Saund. (a), note.

^b *R. v. Eardisland*, 2 Camp. 494.

^c But in *R. v. Turner*, 1 Moo. C. C. 347; *R. v. Ratcliffe*, 1 Lew. C. C. 122; *Keable v. Payne*, 8 Ad. & E. 560; E. C. L. R. 35; it is stated that many of the Judges (all the Judges except two being assembled) were of opinion that the record of the conviction of the principal would not be evidence of the fact, where the indictment against the accessory alleged not the conviction but the guilt of the

*368] *facie* evidence.^d But this is perhaps the only case in which a judgment founded on a verdict is not conclusive as to the attainder of the principal.^e For a judgment in a criminal matter, as far as regards all the consequences of the judgment, is binding upon all; the attainder of a criminal is, as long as it remains in force, conclusive upon all claiming from, or through the party attainted.^f And a conviction of a crime, which formerly rendered a person incompetent as a witness, was conclusive against all.^g

Upon the same grounds, decisions in the inferior courts of justice,^h convictions by magistrates, and indeed all other legal and authorized adjudications—as, for instance, sentences of expulsion by colleges, or of deprivation by visitors—are evidence to establish the fact that such an adjudication has taken place, and all the legal consequences that may be derived from it.

Amongst these legal consequences is the protection of any party who has acted in a judicial capacity within the limits of his judicial authority. In order to insure to such parties this protection the law declares that where actions are brought against magistrates and others, in consequence of what has been done under a conviction for any offence within their jurisdiction, the proceedings themselves, if regular, are evidence not only of the fact of the conviction, but of the fact on which the judgment was founded; and the plaintiff is not at liberty to controvert *and dis-
*369] prove it by evidence.ⁱ In an action for trespass and false

principal. And on principle it would seem to be evidence only when the indictment alleges the conviction of the principal, and simply to support that allegation. See note (e), *infra*.

^d Fost. 364, 365; *R. v. Smith*, Leach, 288; see tit. ACCESSORY. One reason assigned is, that the witnesses against the principal may be dead, or cannot be procured; but the main reason appears to be, that the proceeding is *in rem*, and in general conclusive against all the world as to all the consequences of the attain. In *Rex v. Blick*, 4 C. & P. 377; E. C. L. R. 19; the record of the conviction of the principal, upon his pleading guilty, was held to be *prima facie* evidence of the theft as against the receiver.

^e *Qu.* whether this is not admitted *in favorem vitæ*, for it is not necessary that the indictment should aver the guilt of the principal; Fost. 365. It is sufficient to allege the conviction simply; see Fost. Disc. 3, c. 2.

^f Where it is founded upon a *verdict*, an alienee cannot falsify the attainder; 1 Hale, 361; 2 Hawk. c. 50, s. 2.

^g See WITNESS.

^h As to Bankruptcy and Insolvency see these titles, Vol. II.

ⁱ *Fuller v. Fotch*, Holt, 287. In *Wilson v. Weller*, 1 B. & B. 57, E. C. L. R. 5, it was held, that a magistrate's order for the payment of wages to a servant,

imprisonment, the defendant gave in evidence a conviction by him, as a magistrate, of the plaintiff, for unlawfully returning to a parish after removal from it, and a warrant, reciting the conviction, requiring the keeper of the house of correction to keep him to hard labour for twenty-six days; and Yates, J., held that the conviction could not be controverted in evidence, and the plaintiff was nonsuited.^k For although the magistrate may have formed an erroneous judgment upon the facts, that is properly the subject of an appeal; and therefore, where an appeal lies, no action can be maintained till the merits have been heard, and the conviction quashed.^l Whenever a magistrate assumes a more extensive jurisdiction than belongs to him,^m he is liable in an action; and if the excess of jurisdiction appear on the face of the proceedings* the conviction cannot be set up as a defence to the action.ⁿ But where the [*370

stating a complaint upon oath, and an examination on oath, precluded the plaintiff, in replevin, from pleading, in bar of a plea of cognizance, that the complaint was not made upon oath. What judges of the matter have adjudged is not traversable; *per* Holt, C. J., in *Groenvelt v. Burwell*, Salk. 396. But if a constable commit a man for a breach of the peace, his power is traversable, for he is not a judge; he acts not for punishment, but for safe custody; *Ibid.* If a justice of the peace record that upon his view, as a force, which is not a force, he cannot be drawn in question either by action or indictment; 12 Co. 25; 27 Ass. 19; Salk. 397. Neither an indictment nor an action lies against a judge for what he does judicially, and for what he has jurisdiction to do, if the circumstances warrant it; *Hammond v. Howell*, 1 Mod. 184; 2 Mod. 218; *Bushell's case*, Vaugh. 135; 1 H. 6, 64; 47 E. 3, 50; *Dicas v. Lord Brougham*, 1 M. & Rob. 309; see Vol. II. tit. JUSTICES—TRESPASS.

^k *Strickland v. Ward*, 7 T. R. 633; Holt, 287; Carth. 346; Hardr. 478; Cro. Car. 395; 1 Vent. 273; 1 B. & B. 432; E. C. L. R. 5; 2 B. & Ad. 408; E. C. L. R. 22; *Cave v. Mountain*, 1 M. & G. 257; E. C. L. R. 39; *R. v. Bolton*, 1 Q. B. 66; E. C. L. R. 41.

^l *Fuller v. Fotch*, Holt, 287; 7 T. R. 631; 2 B. & P. 391; 12 East, 81; 16 East, 21; *Baylis v. Strickland*, 1 M. & G. 591; E. C. L. R. 39.

^m *Crepps v. Durdan*, Cowp. 640; *Gray v. Cookson*, 16 East, 21; *Hill v. Bate-man*, 2 Str. 710; *Morgan v. Hughes*, 2 T. R. 225.

ⁿ But now, under the statute 11 & 12 Vict. c. 44, s. 2, before any action can be maintained for any act done in a matter of which the justice has not jurisdiction or in which he has exceeded it, the conviction must have been quashed on appeal or by the Court of Q. B. And no action can be brought, even for any thing done under a warrant which has been followed by a conviction or order, until the conviction or order has been quashed. If, too, the conviction or order be confirmed on appeal, no action (s. 6) can be maintained for enforcing it. By s. 3, also, no action at all can be maintained against one justice for issuing a warrant to enforce the conviction or order of another justice, but only against the latter. And upon this statute see *Leary v. Patrick*, 19 L. J., M. C., 211; *Barton v. Bricknell*, 20

proceedings are regular and formal, and the conviction still subsists, the plaintiff cannot go into evidence to show that in the particular case the defendant had no jurisdiction.^o Upon trespass brought against justices, they proved a conviction by them of the plaintiff, for a misdemeanor in his service as an apprentice. The plaintiff, in order to rebut this, offered to prove that the indentures had previously been avoided, and this proof being rejected, he was nonsuited. Upon motion to set aside the nonsuit, the court decided that upon the point of jurisdiction the plaintiff was confined to such objections as appeared on the face of the conviction.^p

*371] *Upon the same principle, it has been held that upon an indictment for assault in turning the prosecutor out of a college, the sentence of expulsion is conclusive evidence of the fact of expulsion.^q And that a sentence of deprivation by a visitor of a college, is conclusive evidence of the fact of each deprivation in an action of ejectment for one of the college estates.^r Such sentences are, however, impeachable for want of jurisdiction.^s

Thirdly, the admissibility of a judgment, decree, or verdict, is to be considered, where the proceeding is, as it is technically called,

L. J., M. C., 1; *Pratt v. Parkinson*, 20 L. J., M. C., 208. For instances in which magistrates have been considered to exceed their jurisdiction, see *Hill v. Bateman*, 2 Str. 710, where the magistrate committed the party to prison, although he had effects which might have been distrained upon: *Groome v. Forrester*, 5 M. & S. 314, where an overseer was committed to gaol until he had given up *all and every the books* concerning his office of overseer, belonging to the parish, the information mentioning one specific book only; Vol. II. tit. JUSTICES—CONVICTION.

^v *Gray v. Cookson*, 16 East, 21; see also *Mann v. Davers*, 3 B. & A. 103; E. C. L. R. 5; *Taylor v. Clemson*, 2 Q. B. 1025; E. C. L. R. 42; *Mould v. Williams*, 5 Q. B. 469; E. C. L. R. 48; and 1 M. & G. 591; E. C. L. R. 39.

^p *Gray v. Cookson*. A warrant of commitment for an offence summarily punishable is no evidence of a fact recited in it, although necessary to give jurisdiction; *Stevens v. Clarke*, 2 M. & Rob. 435. If the warrant were in effect a conviction, it would be otherwise; *R. v. Richards*, 5 Q. B. 926; E. C. L. R. 48.

^q *R. v. Grundon*, Cowp. 315. See the principle, *Reg. v. Governors of Darlington School*, 6 Q. B. 682; E. C. L. R. 51.

^r *Phillips v. Bury*, Skinn. 447; 2 T. R. 346; 1 Ld. Raym. 5; and see *Dr. Patrick's case*, 1 Lev. 65; *Case of New College*, 2 Lev. 14; *Dr. Widdrington's case*, 1 Lev. 23; *R. v. Bishop of Chester*, 1 W. Bl. 22; *Rex v. Bishop of Ely*, *ib.* 71.

^s *Doe v. Haddon*, 3 Doug. 310; E. C. L. R. 26. So, although the sentences of courts martial are conclusive in actions at law, yet the courts of law will examine whether they have exceeded their jurisdiction; *Case of the Ship Bounty*, 1 East, 313; *Grant v. Gould*, 2 H. Bl. 69; *Stratford's case*, 1 East, 313, and see the Mutiny Acts.

in rem. In such case it may be evidence against one who was not a party to the suit, and who does not claim in privity with a party. This happens where a court exercises a peculiar jurisdiction, which enables it to pronounce on the nature and qualities of particular subject-matters of a public nature and interest, independently of any private party.⁴

This class comprehends cases relating to marriage and bastardy, where the Ordinary has certified: sentences relating to marriage and testamentary matters in the Spiritual Court; decisions of Courts of Admiralty, judgments of condemnation in the Exchequer; and adjudications upon questions of settlement.^a The general rule *is, that such a judgment, sentence, or decree, provided it be final in the court in which it was pronounced, is [*372 evidence against all the world, unless it can be impeached on the ground of fraud or collusion.* This seems to be built upon one or both of the following considerations: first, because it is essential to the practical efficacy of such a jurisdiction that its judgments should be binding in all courts; secondly, because all who are interested in the result may usually become parties to the proceeding.

In the first place it is evidently essential to the exercise of a jurisdiction of this nature that its adjudications upon the subject-matter should be final, not only in the courts in which they are pronounced, but in all other courts where the same question arises. It would not only be inconsistent that the decision *in rem* should not be final in the court in which it is pronounced, but, from the nature of the subject-matter, mischievous and inconvenient. Although the parties who are in a greater or less degree affected by the consequences of the judgment may change, the subject-matter is immutable, and therefore the decision upon it ought not to be liable to be disturbed. And it ought to be binding in other courts, in order to prevent inconsistency, and to support the jurisdiction of the court in which that sentence has been pronounced; for it would be in vain for a court like those enumerated of exclusive jurisdiction to decide, if its decisions upon the subject-matter were to be wholly disregarded.

⁴ A commission of bankruptcy is a proceeding to which all the world are parties; *per* Lord Ellenborough in *Gervis v. Grand Western Canal Company*, 5 M. & S. 78. The determination of the Privy Council to advise the Crown to grant a petition for a charter under 1 Vict. c. 76, s. 49, is not conclusive as to its validity; *Rutter v. Chapman*, 8 M. & W. 1.

^a *R. v. Phillips*, 8 Q. B. 745; E. C. L. R. 55.

^{*} B. N. P. 244; 11 St. Tr. 262.

Secondly, in general all parties really interested in the proceeding *in rem* may usually be heard in assertion of their rights. Where a question of marriage or bastardy arises in the courts of common law, the certificate of the bishop, when returned and entered of record, is binding, not only on the parties to that suit, but upon all other litigating parties between whom the same point arises.^v But in cases of bastardy, the stat. 9 Hen. VI.,
 *373] c. 11, specially *provides that before any writ of certificate shall pass out of the court to the Ordinary, a remembrance, reciting the issue joined, shall be certified to the chancellor, and that thereupon proclamation shall be made in Chancery by three months, once in every month, to the intent that all persons, pretending any intererest to object against the party which pretendeth himself to be mulier, be before the Ordinary, to make their allegations and objections, as the law of the holy church requireth. Now, although the immediate object of this statute was to ensure a greater degree of publicity, yet it is to be observed, that it did not affect the proceeding before the Ordinary, but assumed that all who are interested will be allowed to offer their allegations before him. Whence, perhaps, it may be inferred, that in all such cases any party interested is entitled to insist upon his objections before the Ordinary. With respect to the proceedings upon an original suit in the Exchequer, relating to the seizure and condemnation of goods,^a and also to suits in the Spiritual Courts and Courts of Admiralty, it must be presumed that, before they proceed to pass a final decree or sentence, such reasonable notice has been given as the justice of the case requires.

In conformity with these principles, it has been held that the certificate of the Ordinary, when returned to the Temporal Court, is conclusive upon all parties,^a as regards civil rights at least,^b

^v B. N. P. 245; 11 St. Tr. 261; 2 Wils. 128; 3 Bl. Com. 335.

^a In an action for goods sold, the defendant pleaded that the goods, which were sweet spirits of nitre, had been compounded of spirits illegally distilled and were seized while in his possession by the excise, and that an officer having informed the Barons, and prayed condemnation, it was adjudged by the Barons that they should be forfeited. This plea was held insufficient, it being very questionable whether the spirits, when so compounded, were liable to forfeiture, and it not appearing that the vendor had notice of the seizure, or was called upon to protect the property; *Bailey v. Harris*, 12 Q. B. 905; E. C. L. R. 64.

^a B. N. P. 245; 2 Wils. 128; 11 St. Tr. 261; Fitz. Estopp. 282; *R. v. Rhodes*, Leach, 24.

^b As to the effect of such a judgment in a criminal case the law is thus stated,

upon questions of bastardy and *marriage. So the grant of a probate in the Spiritual Court is conclusive evidence [*374 against all as to the title to personalty, and to all rights incident to the character of an executor or administrator.^o¹ So is a sen-

by De Grey, C. J., in *The Duchess of Kingston's case*: "Proceedings in matters of crime, and especially of felony, fall under a different consideration from civil suits, first, because the parties are not the same; for the King, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the Ecclesiastical Courts, and cannot be admitted to defend or examine witnesses, or in any manner intervene or appeal; secondly, such doctrines would tend to give the Spiritual Courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs. The ground of the judicial powers given to the Ecclesiastical Courts is merely of a spiritual consideration, *pro correctione morum et pro salute animæ*. They are therefore addressed to the conscience of the party. But one great object of the temporal jurisdiction is the public peace, and crimes against the public peace are wholly and in all their parts of temporal cognizance alone. A felony by common law was also so. A felony by statute became so at the moment of its institution. The Temporal Courts alone can expound the law and judge of the crime and its proofs; in doing so they must see with their own eyes, and try by their own rules, that is, by the common law; it is the trust and sworn duty of their office."

It is observable that in *The Duchess of Kingston's case*, the judgment given in evidence was not a judgment *in rem*. It has, however, been seen that upon an indictment against one as accessory to a felony, the conviction of the principal, although in other respects conclusive as to his attainder, is at most but *prima facie* evidence against the accessory. The rule, therefore, as laid down by C. J. De Grey, may perhaps in like manner be regarded as an exception *in favorem vitæ*, on the same footing with the case of the accessory, without further impeaching the accuracy of that part of the judgment. See further on this subject, Vol. II. tit. POLYGAMY.

^o Roll. Abr. 638; 4 T. R. 258; 11 St. Tr. 218; 3 T. R. 130; Roll. Abr. 678; *Noel v. Wells*, 1 Lev. 235; 1 Ld. Raym. 262. Even in an indictment for perjury to prove that *A.* made his will and appointed *B.* his executor, although the will applied as well to real as to personal property; *R. v. Turner*, 2 C. & K. 732; *E. C. L. R.* 61. Payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of an intestate; *Allen v. Dundas*, 3 T. R. 125.

¹ The English doctrine, that a probate of a will is conclusive only as to personal property, rests on the ground that the Ecclesiastical courts have no jurisdiction of real property; see 1 Gallison, 623; 10 Wheat. 468, and cases cited 1 Pick. 241. But in all the New England States, in Pennsylvania and North Carolina, and probably in some other States, the probate courts have jurisdiction of wills in respect to property both personal and real. And it has been decided in Connecticut, Massachusetts and North Carolina, that the probate of a will is conclusive with

*375] tence in the *Spiritual Court of nullity of marriage,^a when the decision in the court itself is *direct* and *final*. Accordingly, where the wife, *de facto*, of *T.* was libelled in the Spiritual Court by *J. S.* for a divorce on the ground of a pre-contract with him, upon which the court dissolved the marriage, although *T.*, the husband *de facto*, was no party to the suit, it was held that he was bound by the sentence, and that the issue of the second marriage

^a *Bunting v. Lepingwell*, 4 Co. 29; *Kenn's case*, 7 Co. 41; *Hatfield v. Hatfield*, Str. 961; *Da Costa v. Villa Real*, *ibid.*; *Jones v. Bow*, Carth. 225; *Hervey's case*, 20 How. St. Tr. 395.

regard to lands devised, as it is with regard to chattels; *Bush v. Sheldon*, 1 Day, 170; *Judson et ux. v. Lake*, 3 Day, 318; *Inhabitants of Dublin v. Chadbourne*, 16 Mass. Rep. 433; *Stanley v. Kean*, Taylor, 93. In Rhode Island the probate was formerly considered conclusive only as to personal property; but in *Spencer et ux v. Spencer*, 1 Gallison, 622, Mr. Justice Story intimated very clearly that this was erroneous and ought to be corrected; see also *Smith v. Fenner*, 1 Gallison, 171, 174. In Pennsylvania, however, the probate although conclusive as to the personalty, is held to be only *prima facie* evidence as to the realty; and the party who is dissatisfied may have the title tried in ejectment; *Coates v. Hughes*, 3 Binney, 498; *Spangler v. Rambler*, 4 Serg. & Rawle, 193; *Logan v. Watt et al.*, 5 Serg. & Rawle, 212.

The law of Maryland, as to evidence of the probate of a will of lands, in an action of ejectment is the same with the common law of England; *Smith's Lessee v. Steele*, 1 Har. & McHen. 419; *Darby's Lessee v. Mayer et al.*, 10 Wheat. 470. So also as it seems is the law of South Carolina; see *Howell v. House*, 2 Rep. Const. Ct. 80.

In Massachusetts, the filing and recording in a probate court of that State, of a copy of a will originally proved and allowed in any other State or country, according to the provisions of St. 1785, c. 12, is of the same force and effect as if the original will had been there; *Inhabitants of Dublin v. Chadbourne*, *ubi sup.* In Kentucky, a will not proved and recorded there, has been held not to be, as *such*, admissible evidence for a devisee, though it has been proved and recorded in another State; *Carmichal v. Elmendorf*, 4 Bibb, 484; *Morgan v. Gaines*, 3 Marsh. 614. Such will, however, has been there admitted in evidence as an unrecorded deed upon proof of the requisites of a good will under the statute of that State; *Hood v. Mathers*, 2 Marsh. 555; *Bowman v. Bartlett*, 3 Marsh. 69; and see *Elmendorf v. Carmichal*, 3 Littell's Rep. 479. In Tennessee, the probate of a will of lands in another State is not evidence in an ejectment for lands in Tennessee; *Darby's Lessee v. Mayer et al.*, *ubi sup.*

A statute of the State of New York provides a mode of proving and recording wills in the Supreme Court or a Court of Common Pleas, and makes a transcript of the record, certified by the clerk and sealed with the seal of the court, as effectual in all cases as the original will. But such proof and record have been held not to be conclusive upon the heir, who may still impeach the validity of the will; *Jackson v. Rumsey*, 3 Johns. Cas. 234; 1 Phil. Ev. 434; note to 3d Amer. Ed.

of the wife with *J. S.* was legitimate.^{*1} So where *C. K.* had issue *M. K.* by *C. S.* his wife *de facto*, and after a sentence of nullity of marriage, *C. K.* married *F.*, and they had issue *E. K.*, it was held, upon the death of *C. K.*, that so long as the sentence of nullity stood unreversed, *M. K.*, the issue of the first marriage, was a bastard.[†] Although neither the sentence of a Spiritual Court, nor of any other court, can be evidence upon a subject beyond its jurisdiction,[‡] yet if the matter be within its jurisdiction, it is evidence to all purposes, although not within the jurisdiction. Therefore, in an action of trespass, a sentence of deprivation in the Spiritual Court, on the ground of simony, was allowed to be read, notwithstanding the objection taken that a freehold interest of the plaintiff ought not to be concluded by what was done in the Spiritual Court. For the court said that the Spiritual Court did not oust him of his freehold, but the ouster was the consequence of the sentence.[§]

Sentence in a jactitation suit, as it seems, is not admissible evidence of marriage in a Temporal Court, unless it be *between the same parties ;ⁱ at all events it is not conclusive. [*376 In *Jones v. Bow*,^k where the plaintiff in ejectment claimed through the issue of *Robert Carr* and *Isabella Jones*, it was held that a sentence in the Arches in a jactitation suit, by which it was decreed that there was no marriage between them, was a conclusive bar to the plaintiff, and estopped him from going into any proof of marriage, unless he could show that the sentence had been repealed. The decision, however, is open to the objection that in a jactitation suit the question of marriage arises *collaterally* and not *directly*, and that it is not *final*. In the case of *Hiliard v. Phaly*,¹ it was held, that

* *Bunting v. Lepingwell*, 4 Co. 29.

† *Kenn's case*, 7 Co. 41.

‡ *Betsworth v. Betsworth*, Sty. 10 ; 12 Vin. Abr. 128.

§ *Phillips v. Crawley*, Freem. 84, pl. 103 ; 12 Vin. Abr. 128. Note, the court would not allow the proofs in the Spiritual Court to be read, because it was not a court of record.

¹ *Infra*, p. 378, note (s).

^k Carth. 225, 226 ; 12 Vin. Abr. 128.

¹ 8 Mod. 180.

¹ If a husband leave his wife or a wife her husband, and remove into another State for the purpose of obtaining a divorce, and a divorce is there decreed on grounds which would not authorize it by the law of the State where the marriage was contracted and the parties cohabited ; such decree is void in the latter State, and will be treated as a nullity, whether the question arises collaterally or in a suit by the wife to enforce the allowance of alimony ; *Jackson v. Jackson*, 1 Johns. 424 ; *Borden v. Fitch*, 15 Johns. 121 ; *Inhabitants of Hanover v. Turner*, 14 Mass. 227 ; see also *Barber v. Root*, 10 Mass. 260. M.

proceedings in the Spiritual Court against the father for incontinency with the mother, could not be given in evidence against a child of the marriage claiming by descent from the father.^m And certainly such evidence could not be considered as conclusive, because the marriage was not directly in issue. In *Blackham's case*,ⁿ it was expressly held, that although a matter *directly* decided by the Spiritual Court could not be controverted, yet that the rule did not extend to any *collateral* matter to be inferred from their sentence.

A jactitation suit is founded merely on a supposed defamation, and involves no matrimonial question, unless the defendant plead a marriage; and whether it continues a matrimonial cause throughout, or ceases to be so on failure of proving a marriage, still the sentence has only a negative and qualified effect, viz., that the *377] party has failed in *his proof, and that the libellant is free from all matrimonial contract, as far as yet appears, leaving it open to new proofs of the same marriage in the same cause, or to any other proofs of that or any other marriage in another cause. *And if such sentence is no plea to a new suit in the Ecclesiastical Court, and is not conclusive there, it cannot conclude another court which receives the sentence from going into new proofs to make out that or any other marriage.^o The sentence in a jactitation suit is, therefore, neither a direct nor a conclusive sentence as to any marriage: consequently, as it is not a proceeding *in rem*, it appears on general principles to be inadmissible evidence to prove or disprove a marriage in a proceeding in any other court. In *The Duchess of Kingston's case*, where such a sentence was offered by the defendant on a charge of polygamy to disprove the first marriage, the judges held that such a sentence, even admitting it to be evidence at all in a criminal proceeding, was not *conclusive* evidence, and that at all events its effects might be avoided by proof of fraud or *collusion*.^p In the case of *Robins v. Cruchley*, the plaintiff having brought a writ of dower, the defendants pleaded *ne*

^m The reason which is assigned is, that such proceedings could not affect the title to lands. King, Lord Chancellor, thought that the sentence in the Spiritual Court carried on in a regular suit, and in the lifetime of the parties, that they were guilty of fornication, and the payment of commutation money by the father, was strong evidence to show that there was no marriage, and he thought it hard that it should be excluded.

ⁿ 1 Salk. 290.

^o 20 How. St. Tr. 355.

^p *R. v. Duchess of Kingston*, 20 How. St. Tr. 355. As to the construction of statute 1 Jac. I. c. 11, see POLYGAMY.

unques accouplè; the replication alleged that Sir *W. Wolseley* libelled the plaintiff in the Spiritual Court, as his wife, charging her with adultery with *Robins* (as whose widow she claimed,) and praying a divorce; and that she pleaded that she was the wife of *Robins*, and then set forth the sentence of the court that she was the wife of *Robins*. The defendants demurred; and after two arguments, the court held the plea to be bad; and this judgment seems to have been founded not merely on the consideration that the bishop could not be ousted of his jurisdiction by this plea, but also on the ground that such a decree could not be pleaded in bar at all against a stranger. Wiles, C. J., said,^a no determinations in the high courts *touching lands shall bind strangers; much less ought a sen- [*378 tence in the Spiritual Court, to which Mr. *Robins* was no party, to bind his heirs. And Clive, J., said,^r “*Robins* was no party to the suit; and why the sentence should bind his heirs I cannot conceive it is mere matter of evidence.” So upon an indictment for forging a will, it may be now proved that the will was a forgery, notwithstanding the probate,^t although the contrary was once^u held.”

So a judgment of condemnation in the Exchequer is conclusive upon all,^x not only as to the right of the Crown to the condemned property, but also in justification of the officer who seized it, where the only question is, whether it was forfeited or not.^y But a conviction in a penalty for adulterating spirits, which does not operate *in rem*, is not evidence between other parties. Such a conviction is not evidence for the defendant in an action for the price of spirits

^a 2 Wils. 124.

^r 2 Wils. 124.

^u It was intimated by Wiles, C. J., and Bathurst, J., that the sentence was not conclusive, because it was not final even between the parties, who might (according to Oughton) at any time apply to have it reversed; and that the court would not be bound by the sentence of a Spiritual Court, which was not binding even in that court. Note also, the court said, that the sentence might possibly be evidence before the bishop.

^t *R. v. Buttery and another*, Old Bailey, May 6, 1818. *R. v. Gibson*, Lanc. Summer Ass. 1802, *cor.* Lord Ellenborough; 2 Pothier, by Evans, 356.

^u *R. v. Vincent*, Str. 481.

^x *Scott v. Shearman*, Bl. 977; 11 St. Tr. 218. See *per* Lord Kenyon, *Geyer v. Aguilar*, 7 T. R. 696; Evans's observations, 2 Pothier, 356.

^y *Ibid.* And *quære*, Whether such a condemnation is conclusive against third persons, save as to the fact that the goods are forfeited, and even then if the judgment be by default? *Bailey v. Harris*, 12 Q. B. 905; E. C. L. R. 64. If the ground of condemnation be illegal on the face of it, the judgment is not conclusive; *ibid.*

sold, in proof of their adulteration,² and is not evidence of the facts stated on another charge in respect of the same goods, founded on *a different statute.³ In the case of *Cooke v. Sholl*,^b indeed *379] Lord Kenyon expressed an opinion, that an acquittal in the Court of Exchequer, upon a seizure made for want of a permit, was conclusive evidence in an action for the seizure, that the permit was regular, and precluded all question upon the construction of the permit. It is, however, observable, that the case was decided on a collateral ground, and that on the second mention of the case the court seemed to think that question open to discussion, and wished the parties would consent to have it put upon the record.^{c1}

It has been seen that a condemnation by commissioners of excise is final.^d Although in one case this was doubted. So the judgment of commissioners of taxes on an appeal, is final in an action of trespass against the officer for levying.^e

A conviction *in rem* is evidence, although obtained by the evidence of the very party who seeks to use it.^f

¹ ^{*} *Hart v. Macnamara*, cor. Gibbs, C. J., 4 Price, 154. See also 5 Price, 195; and *Bailey v. Harris*, ante, p. 373, note (z).

^a *Attorney-Gen. v. King*, 5 Price, 195.

^b 5 T. R. 255. The question reserved upon the trial being upon the construction of the permit, and not on the point whether the determination in the Exchequer was conclusive, a verdict was entered for the defendant. And see 12 Vin. Abr. A. b. 22.

^c *Supra*, note (b). A mere acquittal, it has been seen, (*supra*, p. 361), stands on a very different footing as to its effect in evidence from a conviction; it may have resulted from collateral causes, independent of the merits; and in such a case it may be doubted whether the general principle, that a man is not to be concluded by a proceeding to which he was no party, is superseded by the peculiar principles which give effect to judgments *in rem*.

^d *Supra*, p. 348, *Fuller v. Fotch*, Carth. 346. And see *Terry v. Huntington*, Hardr. 480; *Lane v. Hegberg*, B. N. P. 19; *Brown v. Bullen*, 1 Doug. 407; *Radnor v. Reeve*, 2 B. & P. 391; *Henshaw v. Pleasance*, 2 Bl. 1174.

^e *Patchett v. Bancroft and others*, 7 T. R. 367; B. N. P. 244. See, also, 5 Price, 202.

^f *Davis v. Nest*, 6 C. & P. 167; E. C. L. R. 25.

¹ So a decree of *restitution* in the District Court of the United States, of a vessel which had been seized by revenue officers is conclusive evidence, in an action by the owner against the officers that the seizure was illegal; *Galston et al. v. Hoyt*, 13 Johns. 561; 3 Wheat. 246. There is no distinction, as to the conclusiveness of a sentence operating *in rem* between a condemnation and an acquittal; the rule of evidence is reciprocal; *Ibid.*; see also 12 Vin. Ab. A. b. 22; *The Bennet*, 1 Dodson's Rep. 180. M.

Inquisitions of lunacy are admissible but not conclusive evidence when the question is as to the state of the party's mind.⁶

*Upon the same principles,^a adjudications in the Courts of Admiralty, whether domestic,ⁱ or foreign,^k upon prize ques- [*380
tions, being decisions of an exclusive jurisdiction operating *in rem*, are conclusive evidence upon the matters which they decide,^l when the same points arise incidentally in other courts; whether they involve questions as to the right of property, as in actions of trover;^m or the questions of compliance or non-compliance with warranties in actions on policies of assurance; and even although it appear that the court has acted on peculiar rules of evidence and presumptions which are not consistent with general principles."¹

⁶ In debt on bond against executors of obligor, an inquisition finding that the testator was a lunatic, without lucid intervals, at the period of the execution of the bond, is admissible, though not conclusive evidence; *Faulder v. Silk*, 3 Camp. 126; *Frank v. Frank*, 2 M. & Rob. 314; see also *Surgeson v. Sealy*, 2 Atk. 412. Vol. II. tit. WILLS.

^a "From the time of Lord Hale down to the present period, it has been clearly settled that a sentence of condemnation in the Court of Admiralty, where it proceeds on the ground of enemy's property, is conclusive that the property belongs to enemies, and not only for the immediate purpose of such sentence, but is binding in all courts and against all persons. The sentence of the Court of Admiralty proceeding *in rem* must bind all parties, must bind all the world." By the Master of the Rolls, in *Kindersley v. Chase*, at the Cock-pit, 1801, Park on Insurance, 743.

ⁱ 2 East, 473; *Geyer v. Aguilar*, 7 T. R. 681; *Garrels v. Kensington*, 8 T. R. 230; *Baring v. Royal Exchange Assurance*, 5 East, 99; *Le Caux v. Eden*, 2 Doug. 606; *Kindersley v. Chase*, Park, Ins. 743.

^k *Hughes v. Cornelius*, 2 Show. 232; 2 Doug. 575; *Burrows v. Jemino*, 2 Str. 733; *Roach v. Garvan*, 1 Ves. 157; Eyre, C. J., observations, 2 H. Bl. 410. But the sentence must be given either in the belligerent courts, or in that of a co-belligerent or ally, by a court constituted according to the law of nations; 8 T. R. 270; *Havelock v. Rockwood*, 8 T. R. 268; *Donaldson v. Thompson*, 1 Camp. 429.

^l *Barzillay v. Lewis*, Park, Ins. 725: that the property was neutral; *Baring v. Claggett*, 3 B. & P. 201; *Saloucci v. Woodmas*, 3 Doug. 345; E. C. L. R. 26: that it was enemy's property, Park, Ins. 725, 727.

^m *Ibid.* Per Chambre, J., in *Lothian v. Henderson*, 3 B. & P. 513; *Baring v. Claggett*, 3 B. & P. 214.

ⁿ *Bolton v. Gladstone*, 5 East, 155; 5 East, 99; 2 Taunt. 85.

¹ This doctrine is recognized in the Supreme Court of the United States, in Massachusetts, Connecticut and South Carolina; *Craudson et al. v. Leonard*, 4 Cranch, 434; *Baxter v. New England Marine Ins. Co.*, 6 Mass. Rep. 277; 7 Id. 275; *Steward v. Warner*, 1 Day, 142; *Brown v. Union Ins. Co.*, 4 Id. 179; *Campbell v. Williamson*, 2 Bay, 237; *Groning v. Union Ins. Co.*, 1 Nott & McCord, 537.

The Supreme Courts of New York and Pennsylvania also adopted the same

*Accordingly" it has been held that a sentence of condemnation by a French Court of Admiralty during a war between England and France, is conclusive evidence to show that the ship was not Swedish.^p So a sentence of condemnation is conclusive evidence to show that a ship was not neutral, if that appear to have been the ground of condemnation.^q So a condemnation of a ship at Malaga, on the ground, *inter alia*, that the ship was English, was held to be conclusive evidence that she was not neutral.^r And whenever the sentence states the facts upon which the condemnation was grounded, it is conclusive as to those facts;^s as where the ship is condemned on the ground that she was enemy's property.^t And where the ground of condemnation is doubtful, the court will look into the proceedings to ascertain the grounds of the sentence,^u and

^p *Burrows v. Jemino*, 2 Str. 732; *Roach v. Garvan*, 1 Ves. 157. Eyre, C. J., observations, 2 H. Bl. 410; *contra*, *Walker v. Witter*, 1 Doug. 1.

^q B. N. P. 244; 2 Show. 232.

^r *Bernardi v. Motteux*, Doug. 554; *Calvert v. Boyill*, 7 T. R. 523.

^s *Oddy v. Bovill*, 2 East, 473.

^t *Christie v. Secretan*, 8 T. R. 192; *Marshal v. Parker*, 2 Camp. 69; *Everth v. Hannam*, 2 Marsh. 72; *Fisher v. Ogle*, 1 Camp. 418.

^u 3 Bos. & Pul. 525; Doug. 574.

^v 3 Bos. & Pul. 525; *Bolton v. Gladstone*, 5 East, 155; *Baring v. Royal Ex-*

doctrine; *Vandenheuvel v. United States Ins. Co.*, 2 Johns. Cas. 125; *Dempsey v. Ins. Co. of Pennsylvania*, 1 Binney, 299; note 4 Yeates, 119, S. C. But in the former State, a contrary doctrine was established by the Supreme Court of Errors, 2 Johns. Cas. 451; and in the latter, the Legislature have enacted that no sentence of a foreign prize court shall be conclusive evidence of any thing therein contained, except of the acts and doings of such tribunal; Act of March 29th, 1809, 5 Sm. Laws, 49.

The sentence of a foreign court of admiralty or other foreign tribunal, is not regarded as conclusive evidence by the courts of Virginia; *Bourke v. Granberry*, 1 Gilmer, 16.

The doctrine of the conclusiveness of foreign prize courts is not novel, nor does it take its origin in an incorrect extension of the principle in *Hughes v. Cornelius*, (2 Shew. 232, 2 Dougl. 575,) but is coeval with the species of contract to which it is applied and results from the application of the same legal principle which prevails in respect to domestic judgments and sentences of foreign courts; per Washington, J., *Croudson et al. v. Leonard*, *ubi sup.* The sentence of a prize court, however, is not conclusive to establish any particular fact, without which the sentence may have been rightly pronounced; *Maley v. Shattuck*, 3 Cranch, 488; see *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch, 185; *Maryland Ins. Co. v. Wood*, 6 Cranch, 29; *The Mary*, 9 Cranch, 126; *Calhoun v. Ins. Co. of Pennsylvania*, 1 Binney, 293; and *Galbraith v. Gracie*, there cited; 1 Hall's Law Journal, 139, 148.

will act upon the grounds of that decision, provided they can be distinctly ascertained.* But such a *judgment must decide the point distinctly: the intention of the court to decide the point is not to be collected by inference or argument, but by specific affirmation;⁷ and even to this extent such decisions have not without considerable reluctance been held to be conclusive.² If the facts disclosed do not warrant the sentence, it will not, as to them, be conclusive.³ [*382]

So if the sentence has not decided the question of property, nor declared whether it be neutral, but has condemned the property as prize on a different ground, *e. g.* of a foreign ordinance against the law of nations, the sentence, although conclusive on the question of prize or no prize, would not be so on the question of neutrality.⁵ Such a sentence is not admissible, unless it be that of a court, constituted according to the law of nations, exercising its functions in the belligerent country, or in the country of a co-belligerent or ally^c in the war.

change Assurance Company, 5 East, 99. If a ship be condemned generally as lawful prize, no special ground being stated, it is to be presumed that it proceeded on the ground that the property was that of enemies; *Saloucci v. Woodmas*, 3 Doug. 345; E. C. L. R. 26; *Kindersley v. Chase*, Park, Ins. 743.

* *Kindersley v. Chase*, Cock-pit, 1801, Park on Ins. 743; Sir Will. Scott's observations on the case of *Pollard v. Bell*, *ib.* Where the sentence of condemnation of a foreign prize court, for breach of blockade, was expressed with so much ambiguity as to render it impossible to ascertain the real ground on which it proceeded; held, that the court was at liberty, upon the evidence given at the trial in an action on the policy, to determine whether such violation of the blockade did take place or not; held also, that a voyage described in the policy as to *B.*, but if advised of a blockade continuing, then to *M. V.*, was not illegal; *Dalglish v. Hodgson*, 7 Bing. 495; E. C. L. R. 20; and see *Naylor v. Taylor*, 9 B. & C. 718; E. C. L. R. 17; *The Shepherdess*, 5 Rob. Adm. R. 262; *Horneyer v. Lushington*, 3 Camp. 89; *Bernardi v. Motteux*, Doug. 581.

⁷ *Per* Lord Ellenborough, C. J., in *Fisher v. Ogle*, Park on Ins. 554; 1 Camp. C. 418. *Per* Tindal, C. J., *Dalglish v. Hodgson*, 7 Bing. 504; E. C. L. R. 20.

² See Lord Ellenborough's observations, *ibid.*

³ *Calvert v. Bovill*, 7 T. R. 523; *Pollard v. Bell*, 8 T. R. 444; see also *Bird v. Appleton*, 8 T. R. 562; *Bolton v. Gladstone*, 2 Taunt. 85; 2 Camp. 154. If the grounds of the decision do not at all appear, *qu.*

⁵ *Pollard v. Bell*, 8 T. R. 444; *Baring v. Claggett*, 3 B. & P. 215; *Bird v. Appleton*, 8 T. R. 562.

^c *Oddy v. Bovill*, 2 East, 473. And, therefore, a sentence pronounced by the authority of a capturing power, within the dominions of a neutral country, to which the prize has been taken, is illegal, and inadmissible to falsify the warrant of neutrality; *Havelock v. Rockwood*, 8 T. R. 268; *The Flad Oyen*, 8 T. R. 270; *Donaldson v. Thompson*, 1 Camp. 429.

Such a sentence is binding, not only on the parties to the foreign suit, but in all courts and on all persons.^d The admissibility of
 *383] such evidence seems to extend to all *decisions of foreign courts of competent jurisdiction which operate *in rem*.^e

So orders of justices on questions of settlement, not appealed against,^f or when confirmed at sessions, are conclusive against all,^g as to all the facts stated in the order,^h and as to all derivative settlements.ⁱ So an order of removal executed without appeal is also conclusive^j as to the settlement of the pauper up to that time, against all the world; but where the justices wanted jurisdiction, the order is a nullity;^k and may be objected against, even after a lapse of twenty years. So orders of justices under 34 Geo. III., c. 64, for dividing roads, are conclusive.^l

*384] The proceeding by *quo warranto* is analogous to a proceeding^m *in rem*, so that a judgment of ouster against a mayor upon a *quo warranto* is evidence upon a similar proceeding against a burgess who claims to have been admitted by that

^d See *Kindersley v. Chase*, Park on Ins. 743.

^e As in case of marriage; *Roach v. Garvan*, 1 Ves. 157. See Lord Hardwicke's observations, *ibid*. So on criminal charges; *Hutchinson's case*, 2 Str. 733; 1 Show. 6; *Roche's case*, 1 Leach, C. C. L. 134; *supra*, and see Vol. II. tit. MARRIAGE; and further, as to the mode of proving the foreign law, see Vol. II. tit. FOREIGN LAW.

^f *Rex v. Kenilworth*, 2 T. R. 599.

^g *R. v. Northfeatherston*, 1 Sess. C. 154; 4 Ch. Burn, 1159. So an order of filiation is conclusive to show that the party is the putative father; *R. v. Best and others*, 6 Mod. 185; see also *R. v. Catterall*, 6 M. & S. 83; *R. v. Sarratt*, Burr. S. C. 73; *R. v. Harrow and Ryslip*, Salk. 524; *R. v. Kneptoft*, 2 B. & C. 883; E. C. L. R. 9; *R. v. Wick St. Lawrence*, 5 B. & Ad. 526; E. C. L. R. 27; *R. v. Wheelock*, 5 B. & C. 511; E. C. L. R. 11; *Osgathorpe v. Diseworth*, 2 Str. 1256; *R. v. Oldbury*, 4 Ad. & E. 167; E. C. L. R. 31. The fact whether the order was quashed on the merits or not may be inquired into on subsequent removal; *R. v. Wick St. Lawrence*; *R. v. Wheelock*, *ubi sup.*; *R. v. St. Ann's, Westminster*, 9 Q. B. 878; E. C. L. R. 58; *R. v. Widecombe*, *ibid*. 894; *R. v. Leeds*, *ibid*. 910. It seems questionable whether a pauper lunatic order under 9 Geo. IV. c. 40, is final; see *R. v. St. Peter's, Droitwich*, 9 Q. B. 886; E. C. L. R. 58. See Vol. II. tit. SETTLEMENT, where the decisions are more fully considered.

^h *Ibid.*; and *R. v. Woodchester*, 2 Str. 1172; B. S. C. 191.

ⁱ *R. v. St. Mary, Lambeth*, 6 T. R. 616; *R. v. Silchester*, B. S. C. 551; 2 Bott. 686; *R. v. Wye*, 7 Ad. & E. 770; E. C. L. R. 34; *per* Lord Denman, C. J.

^j *Rex v. Kenilworth*, 2 T. R. 598; *R. v. Corsham*, 11 East, 388; and see 2 Salk. 488; *Sutton St. Nicholas v. Leverington*, B. S. C. 276.

^k *R. v. Chilverscoton*, 8 T. R. 178.

^l *R. v. Hickling*, 7 Q. B. 880; E. C. L. R. 53.

mayor;^m and is conclusive evidence, unless fraud can be shown.ⁿ So also a conviction of felony is, for many purposes, a proceeding *in rem*; and is in general binding against all as to the consequences of the attainder. It is, however, as has been seen, competent to an accessory to controvert the guilt of the alleged principal, although the record of conviction may be in some cases *primâ facie* evidence against the accessory as to the guilt of the principal. In Buller's *Nisi Prius*, a conviction for bigamy seems to be considered to be in the nature of a proceeding *in rem*; and, therefore, as conclusive in an action of ejectment upon a question of legitimacy:^o this, however, seems to be very doubtful in principle.

Where the judgment is admissible evidence against one who was neither a party nor privy to it, being a direct, final and conclusive determination of a court of competent jurisdiction upon the particular subject-matter, the rule seems to be, that the judgment is conclusive in any other court, unless it can be impeached on the ground of fraud or collusion.^{p1} Fraud, however, does not merely lower the evidence to mere *primâ facie* evidence of the fact, capable of being rebutted by adverse evidence, but destroys its effect altogether. For it seems that a record of a judgment *in rem* is usually either *conclusive*, or wholly *inoperative*; except, indeed, in those cases of felony where the guilt of the accused depends partly upon the guilt of another, as the guilt of an accessory depends upon that of the principal; for there the record of the conviction^{*} of the principal is but *primâ facie* evidence to affect the accessory, who may controvert the guilt of the principal, notwithstanding

^m B. N. P. 231; *R. v. Lisle*, Andr. 163; *R. v. Hebden*, 2 Str. 1109; *R. v. Mayor of York*, 5 T. R. 66.

ⁿ *R. v. The Mayor of York*, 5 T. R. 66.

^o B. N. P. 245; *supra*, 338, *et seq.*

^p B. N. P. 244; 31 St. Tr. 262. Fraud (according to Lord Coke) avoids all judicial acts, ecclesiastical or temporal; 3 Co. 77.

¹ A judgment cannot be collaterally questioned unless for covin or collusion; *Postens v. Postens*, 3 Watts & Serg. 127; *Baird v. Campbell*, 4 Ibid. 191; *Atkinson v. Allen*, 12 Verm. 619; *Callahan v. Griswold*, 9 Missouri, 784; *Smith v. Keen*, 26 Maine, 411.

A judgment, if merely irregular, is binding upon every body but the defendant; another judgment creditor against the same defendant cannot take advantage of the irregularity; *Lowber & Wilmer's Appeal*, 8 Watts & Serg. 387; *Evans v. Adams*, 3 Green. 373; *Smith v. Bradley*, 6 Smedes & Marsh. 485; *Swiggart v. Harber*, 4 Scam. 364; *Lewis v. Rogers*, 4 Harris, 18; *Chesnut v. Marsh*, 12 Illinois, 173; *Roemer v. Denig*, 6 Harris, 482; *Breeding v. Boggs*, 8 Ib. 33.

ing the record.¹ A judgment upon a *quo warranto* against a mayor, which is evidence as we have seen upon a *quo warranto* against one claiming to be a burgess by virtue of his admission, may be impeached upon the ground of fraud.² So in *The Duchess of Kingston's case*, the trial of the defendant, on an indictment for bigamy, one of the points resolved by all the judges was, that admitting a sentence of the Spiritual Court in a jactitation suit to be conclusive evidence for a defendant, yet, that still the counsel for the Crown might avoid the effect of it by proving it to have been obtained by fraud and collusion.^{3 1}

¹ Fost. 365, 366, 367; *Lord Sanchar's case*, 9 Co. 117, 119; *supra*, *England v. Bourke*, 3 Esp. C. 80. See *ante*, p. 367, note (c).

² *R. v. Grimes*, Burr. 2598; B. N. P. 231; 2 Barnard, 370; *R. v. Lisle*, Andr. 163; 5 T. R. 72; *R. v. Hebden*, Str. 1100; 17 How. St. Tr. 802; and see the cases last cited.

³ 20 How. St. Tr. 355; *Cross v. Salter*, 3 T. R. 639.

¹ See *Hull v. Blake*, 13 Mass. Rep. 157; *Potter v. Wheeler*, Id. 507; *Winchell v. Stiles*, 15 Mass. Rep. 230; *Borden v. Fitch*, 15 Johns. 121; *Andrews v. Montgomery*, 19 Johns. 164, where the principle, that fraud will vitiate all judicial acts is distinctly recognized.

In *Stewart v. Warner, et al.*, 1 Day, 142, it was held, however, that the sentence of condemnation of a foreign court could not be avoided by fraud, when collaterally called in question.

The judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as *absolutely void*; and therefore all acts performed under them are valid so far as respects third persons. A sheriff, who levies an execution under a judgment fraudulently obtained, is not a trespasser; nor can the person, who purchases at a sale under such an execution be compelled to relinquish the property he has purchased. All acts performed under such a judgment are valid acts; all the legal consequences which follow a judgment are, with respect to third persons, precisely the same in one obtained by fraud as if it had been obtained fairly.

When a person who has committed the fraud attempts to avail himself of the Act, so as to discharge himself from a previously existing obligation or to acquire a benefit, the judgment thus obtained is declared void as to that purpose; but it may well be doubted whether a penalty would be incurred even by the person committing the fraud, for an act which the judgment would sanction. It is believed that no case can be adduced where an act, which is the legal consequence of a judgment, has in itself created a new responsibility, even with respect to the party himself, much less with respect to third persons who do not participate in the fraud. Per Marshall, C. J., *Simms et al. v. Slocum*, 3 Cranch, 300. Hence it was held in that case, that a discharge from the prison rules, under the Insolvent Act of Virginia although obtained by fraud, was a discharge in due course of law; and that upon such discharge, no action could be sustained upon the prison bonds.

So in *Ammidon v. Smith et al.*, 1 Wheat. 447, a similar decision was made re-

Although it is a general rule that a stranger may be admitted to impeach a proceeding to which he was not a party, on the ground of fraud or collusion, the reason ceases where the judgment or sentence is offered against one who was a party to it. In the case of *Prudham v. Phillips*, the defendant proved her marriage with A. B.; this was answered by a sentence in the Ecclesiastical Court (to which she was a party,) which showed that she was then married to another person; and after much consideration, Willes, C. J., refused to permit the defendant to show that the sentence had been fraudulently obtained.^b Judgments of courts of competent jurisdiction in foreign countries, upon the subject of marriage, and all other matters where the adjudication can be considered* as *in rem*, seem to be equally binding with the decisions of our own courts.^c [*386]

Lastly,^d in cases of custom, prescription, and pedigree, or where general reputation is evidence, a judgment, decree, or sentence is evidence, not only as between the same parties, (where it would be conclusive upon the same point,) but also against all others; for such evidence is of the same nature, but much stronger, than mere evidence of reputation.^e It is not indeed to be considered as evi-

^b Ambler, 763. And see *Bessey v. Windham*, 6 Q. B. 166; E. C. L. R. 51. But where a *sci. fa.* is brought against a shareholder of a company on a judgment against the company, he may allege that the judgment was obtained by fraud; see *Philipson v. Earl of Egremont*, 6 Q. B. 587; E. C. L. R. 51.

^c See Lord Hardwicke's *dictum*, *Roach v. Garvan*, 1 Ves. 159; and *supra*, p. 383.

^d *Supra*, p. 320.

^e *Reed v. Jackson*, 1 East, 355. The record of a judgment in an action of

specting a discharge according to the statute of Rhode Island, for the relief of poor prisoners for debt, although obtained by fraud and perjury. "But the court" says C. J. Marshall, "does not mean to indicate that the effect of the oath and discharge granted by the magistrate, might not be controverted in any proceeding against the parties, either in law or equity, other than in a suit on the bond for keeping the prison rules." M. (See also *Lincoln v. Williams*, 12 Serg. & Rawle, 105. 1.)

¹ Verdicts and judgments between other parties (say the court of Connecticut) are admissible to prove a public right of way, only when the party claims by prescription, and merely to corroborate the presumption of a grant; *Fowler v. Savage*, 3 Conn. Rep. 90. M.

Although in general a verdict between strangers cannot be given in evidence against a party, yet, where reputation is admissible in evidence, a verdict between strangers may be also as on a question of pedigree; *Patterson v. Gaines*, 6 Howard S. C. 550; *Pile v. McBratney*, 15 Illinois, 314.

dence of any specific fact existing at that time, but it is proof of an adjudication of a competent tribunal upon the state of facts and upon the question of usage at that time.² Accordingly, to prove a custom, not only an ancient verdict in prohibition has been held to be evidence, but also a recent verdict.³ So is a decree in the Exchequer, on a commission to try the question of custom;⁴ or of modus.⁵ So in the case of a prescription for a public right of way, a verdict against one defendant, negating such a right, is evidence against another defendant who justifies under the same right.⁶ So upon a question as to a right of ferry,⁷ or the liability to repair a public highway,⁸ or bridge,⁹ or sea walls,¹⁰ or upon the public
 *387] right of election to a parochial office, a *judgment or decree between third parties is evidence.¹¹ So in an action by the lord of a manor against a copyholder for trespass to his free warren, a judgment in a *quo warranto* brought against the former owner of the manor, in which he pleaded a prescriptive right to the free warren as appurtenant to the manor, and the Attorney-General confessed it on record, is evidence for the plaintiff in support of the right of free warren by prescription.¹² And this over the lands of tenants as well as over the demesne lands, where the information charged a usurpation of the franchise over both, and the court gave judgment for the defendant as to both, although the plea set forth a title as to the demesne lands only, and the Attorney-General's confession followed the plea; the court thinking it probable that the omission was accidental.¹³ A recent judgment for the plaintiff in another action against another copyholder for a trespass on the plaintiff's free warren was also held admissible

trespass by a corporation for putting up stalls in a market, the defendant having pleaded a right to do so without paying toll, is admissible evidence for the corporation, being relevant to the claim in issue; *Lancum v. Lovell*, 6 C. & P. 437; E. C. L. R. 25. But the rule does not extend to awards; *Evans v. Rees*, 10 Ad. & E. 151; E. C. L. R. 37.

² *Per Parke, B., Pim v. Curell*, 6 M. & W. 266.

³ B. N. P. 233; *City of London v. Clarke*, Carth. 181.

⁴ *Cort v. Birkbeck*, Doug. 218.

⁵ *Croughton v. Blake*, 12 M. & W. 205.

⁶ *Read v Jackson*, 1 East, 355.

⁷ *Pim v. Curell*, 6 M. & W. 234.

⁸ *Ibid.* and *R. v. St. Pancras*, Peake, C. 219.

⁹ *R. v. Sutton*, 8 Ad. & E. 516; E. C. L. R. 35.

¹⁰ *Reg. v. Leigh*, 10 Ad. & E. 398; E. C. L. R. 37.

¹¹ *Berry v. Banner*, Peake, C. 156.

¹² *Earl of Carnarvon v. Villebois*, 13 M. & W. 313.

¹³ *Ibid.*

against the defendant.^m So a special verdict between other parties is evidence to prove a pedigree.ⁿ

Such evidence is not conclusive,^o unless both the parties be the same. When such evidence is adduced to prove a custom or prescription, where general reputation would be evidence a judgment or verdict would be evidence against strangers to the record, as falling within the general description of evidence capable of supporting such an issue, being in fact a solemn adjudication founded upon satisfactory testimony, and therefore certainly as binding upon a stranger as much as mere hearsay upon the subject;* but it is not *conclusive*, where the party was in fact a stranger to the record, because he had not an opportunity to cross-examine the witnesses, or to disprove the fact by opposite testimony, and ought not to be concluded by the *laches* of another. [*388]

The *proofs* of verdicts, decrees, and judgments, whether of record or not of record, have already been considered in common with the proofs of public documents in general.^p At present, such matters only will be noticed as are peculiar to this species of document. They are either of record or not of record. If of record, they are to be proved either by actual production from the proper repository, by an exemplification,^q or by a sworn^r or admitted^s copy.

^m *Ibid.*

ⁿ B. N. P. 233; Carth. 79; Sir T. Jones, 224; *Neale v. Wilding*, 2 Str. 1151. Wright, J., was of opinion in that case that the verdict was admissible; the other Judges differed from him, because it was *res inter alios acta*, and the evidence laid before the former jury might, for anything they knew to the contrary, still be produced.

^o See the cases referred to, and also *Tooker v. Duke of Beaufort*, 1 Burr. 146; *Biddulph v. Ather*, 2 Wils. 23; *Mayor of Hull v. Horner*, Cowp. 102.

^p See PUBLIC DOCUMENTS, PROOF OF, *ante*, p. 257, *et seq.*; and see pp. 262, 263, the statutes as to admission of certified copies.

^q See *ante*, p. 257; Bac. Abr. Ev. F.; Str. 162.

^r On *nul tiel record* the record itself must be produced, or its tenor certified by *certiorari*; see *ante*, p. 256, and there can be no amendment of a variance under 3 & 4 Will. IV. c. 42; *Cooper v. Pennefather*, 7 C. B. 739; E. C. L. R. 62. Various statutes have directed that copies of the proceedings under them authenticated in various modes shall be evidence, see *ante*, p. 264. And there is also the general statute, 8 & 9 Vict. c. 113, set out, *ante*, p. 296, as to such copies. Where no other Act exists which renders a copy of any public book or document admissible, a copy, purporting to be signed and certified by the officer to whose custody the original is entrusted is admissible, 14 & 15 Vict. c. 99, s. 14. By s. 13 also of that Act a certified copy of a conviction or acquittal of any indictable offence is made evidence without the formal parts. See Appendix.

^s Notice should be given to admit copies, which if admitted will be evidence; *Davies v. Davies*, 9 C. & P. 252; E. C. L. R. 38.

Records are complete as soon as they are delivered into court ingrossed upon parchment, and become permanent rolls of the court;[†] then, and not before, a copy becomes evidence.[‡] On a *389] writ of error assigning as error *that the sentence (for conspiracy) pronounced at Nisi Prius was faulty, the Exchequer Chamber refused to notice a statement of the sentence embodied in the transcript of the record, but required the *postea* itself with the sentence indorsed to be brought up, and granted a *certiorari* for that purpose.[§] A judgment of the House of Lords may be proved by means of a copy of the minute-book of the House of Lords, for the minutes of the judgment are the solemn judgment itself.[¶] An averment that a commission has been duly superseded, must be proved by a writ of *supersedeas* under the great seal.[‡]

A verdict is not evidence without producing the judgment, or an examined copy, for perhaps the judgment was arrested, or a new trial granted;[‡] but the rule does not hold where the trial was

[†] Therefore an unsealed issue roll not carried in, and bearing only an ink stamp sold by stationers with the name of the court, and the number of the roll, is not a record, and is no evidence of the entry of a *nolle prosequi* as to one defendant; *Fagan v. Dawson*, 4 M. & G. 711; E. C. L. R. 43.

[‡] Gilb. Law of Ev. 25; *ante*, p. 257; B. N. P. 228. An allegation in an indictment that at the quarter sessions, &c., a bill of indictment was preferred against A. B. and found by the grand jury, could only be proved by a caption formally drawn up of record and by the production of the original or an examined copy; therefore the minutes of the clerk of the peace were inadmissible, although no record had in fact been drawn up; *R. v. Smith*, 8 B. & C. 341; E. C. L. R. 15. But in *The King v. Tooke*, there cited, it was held that the indictment, with the officer's notes, was during the same sittings evidence of an acquittal of one charged as a conspirator, without having the record formally drawn up; see tit. CONSPIRACY. To prove the time of signing final judgment, the day-book at the judgment-office, from which the judgments are entered into the docket-books is not evidence; *Lee v. Meacock*, 5 Esp. C. 177. Proof of a writ of execution is not evidence of a judgment, except as against a party to the cause; *Ackworth v. Kempe*, Doug. 40; *Bessey v. Windham*, 6 Q. B. 166; E. C. L. R. 51; and see Vol. II. tit. SHERIFF.

[§] *R. v. King and others*, 7 Q. B. 782; E. C. L. R. 53.

[¶] *Per* Lord Mansfield, *Jones v. Randall*, Cowp. 17; Bac. Abr. Ev. F.

[‡] *Poynton v. Forster*, 3 Camp. 60.

[‡] *Pitton v. Walter*, 1 Str. 161; Willes, 367; B. N. P. 234; Hard. 118. But formerly a verdict was admitted, although the judgment was arrested; Gilb. Law of Ev. 31.

¹ This principle was recognized in *Ridgely et al. v. Spencer*, 2 Binney, 70, where it was decided that a former verdict in the same cause which had been set aside by the court was not evidence. So a verdict in a former suit where the judgment was reversed for error in fact, is not evidence on a new trial; *Richardson's Lessee*

upon an issue out of Chancery, for there the decree was evidence that the verdict was satisfactory.^b But the production of the *postea* without *the judgment is evidence to show the fact that there was a trial between the parties,^c and the amount of [*390

^b *Montgomery v. Clarke*, B. N. P. 234; *Bac. Abr. Ev. F.*; *Hopkins v. Jones*, 1 Barnard, 243. Where a court of equity directs the second trial of an issue, the verdict on the first is not admissible in evidence on the second; *O'Conner v. Malone*, 6 Cl. & F. 572.

^c Str. 162; Barnard, 243; *R. v. Minns*, 2 Esp. N. P. 253; see *Harrap v. Bradshaw*, 9 Pri. 359; Willes, 367. In *Fisher v. Kitchingman*, Willes, 367, it was held that the *postea* and indorsement on it were admissible to prove allegations, that a cause (which was proved *alunde* to have existed) was brought to trial on an issue joined, when a juror was withdrawn, and the cause referred; see Barnes, 449; 7 Mod. 451. But the *postea* is not evidence to establish the fact proved by the verdict; *Pitton v. Walter*, 1 Str. 162; in *Garland v. Scoones*, 2 Esp. C. 648, indeed, Lord Kenyon is reported to have held that the mere production of the *postea* was sufficient to establish a set-off for the defendant, to the extent of the sum indorsed as the verdict in the cause; and added, that in the case of issues out of Chancery, the Chancellor always admitted the production of the *postea* as conclusive evidence of the extent of the demand. But it is not usual to enter up judgment in such a case, and the decree of the Court is proof that the judgment stands in force; *Montgomery v. Clarke*, B. N. P. 234; *Hopkins v. Jones*, 1 Barnard, 243. In the case of *Baskerville v. Brown*, 2 Burr. 1229, which was cited by the party offering the *postea* in *Garland v. Scoones*, the objection was, that the defendant having recovered a verdict for 30*l.* against the plaintiff at

v. Parsons, 1 Har. & J. 253; S. P., *Greene v. Stone*, *Ibid.* And a special verdict found on a former trial between the same parties but which was set aside, because a fact was not sufficiently found is not evidence on another trial; *Mahoney v. Ashton*, 4 Har. & McHen. 295. But in Pennsylvania, a verdict in a former ejectment is evidence against the defendant, if he has acquiesced in it by paying the costs and delivering possession, although no judgment has been entered upon it; *Shaeffer v. Kreitzer*, 6 Binney, 430.

In Tennessee, a verdict cannot be given in evidence, unless it appears from the record that judgment has been given upon it; the court will not presume that judgment was entered; *Ragan v. Kennedy*, 1 Overton's Rep. 94. So in Kentucky, a verdict without judgment thereon is not admissible evidence; *Donaldson v. Jude*, 4 Bibb, 60. In *Hunkle v. Carrath*, 1 Const. Rep. 471, the court of South Carolina in a suit on a record from an adjoining State where the practice was said to be very loose, declared that whenever they could find on the record of another State a single word or act of the court from which a judgment might be inferred they would give effect to it; but that where the record showed a verdict only, an action could not be maintained on it.

In New York, a verdict in an action before a justice of the peace is evidence, without producing the judgments; for the justice can neither arrest judgment nor grant a new trial, but is bound to give judgment on the verdict; *Fetter v. Mulliner*, 2 Johns. 181.

the damages; or as introductory of the evidence of a witness
 *391] *since dead;^d or on a trial for perjury. So an allegation
 that an indictment was preferred, and a true bill found,
 is not proved by the production of the bill itself indorsed as a true
 bill, but should be proved by the record made up; * and the sen-
 tence of the court at the assizes could only be proved by the
 record, and neither the calendar signed by the clerk of assize, nor
 the evidence of a person who heard the sentence passed, is admis-
 sible to show that a prisoner under sentence is in lawful custody.^f
 Proof by the judgment-book is not sufficient, although the record
 may not have been made up, and although the party interested in
 the judgment is a stranger.^g But now, in order to reduce the
 expense attendant upon the proof of the criminal proceedings, it
 is provided, by 14 & 15 Vict., c. 99, s. 13, "that whenever, in any
 proceeding whatever, it may be necessary to prove the trial and
 conviction or acquittal of any person charged with any indictable

the same sittings, could not set off against the plaintiff's claim in the latter action
 for 11*l.*, part of the sum for which he had obtained a verdict, without deducting
 the 11*l.* There the *postea* was offered, not by the defendant in the latter action to
 establish his set-off, but by the plaintiff in the latter action, to show that the
 plaintiff in the former action had taken a verdict for his whole debt. In *Foster v.*
Compton, 2 Stark. C. 364; E. C. L. R. 3; it was doubted whether in such a case
 the plaintiff was entitled to recover half the costs on production of the *postea*,
 with the Master's *allocatur*, without producing the judgment. The *postea* is
 admissible as introductory to prove what a witness, since dead, swore upon the
 former trial; *Pitton v. Walker*, 1 Str. 162; B. N. P. 243; *R. v. Iles*, and *R. v.*
Minns, there cited.—To prove the day on which the court sat for the trial at Nisi
 Prius, the record itself must be produced; *Thomas v. Ansley*, 6 Esp. C. 80.
 Where, however, there are proper materials, the *postea* may be indorsed in court,
nunc pro tunc; *R. v. Hammond Page*, 2 Esp. C. 650; and 6 Esp. C. 83. But
 where a juror has been withdrawn, and the cause referred, such circumstances will
 not be allowed to be indorsed in court at the second trial; *Ibid.* In London and
 Westminster it is not the practice, as in the country causes, for the officer at the
 trial to indorse the *postea*; and the *postea*, with a minute of the verdict indorsed
 by the officer, is evidence to show that the cause came on for trial; *R. v. Browne*,
Moo. & M. 315; E. C. L. R. 22.

^d 1 Str. 162; Hardr. 118.

* *Porter v. Cooper*, 6 C. & P. 354; E. C. L. R. 25; *R. v. Bellamy*, R. & M.
 171; E. C. L. R. 21. So to prove that an appeal was heard, a record should be
 produced, *R. v. Ward*, 6 C. & P. 366; E. C. L. R. 25; unless it be shown that
 only a minute book is kept, as is usually the case, and no record is made up, *R. v.*
Yeoveley, 8 Ad. & E. 806; E. C. L. R. 35; but not as to the trial of an indict-
 ment, *R. v. Bellamy*; *R. v. Smith*, 8 B. & C. 341; E. C. L. R. 15.

^f *R. v. Bourbon*, 2 C. & K. 366; E. C. L. R. 61.

^g *Ayrey v. Davenport*, 2 N. R. 474, and *supra*, note (u).

offence, it shall not be necessary to produce the record of the conviction or acquittal of such person or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court, where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of *the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.” [*392]

Proceedings in Chancery by bill and answer are not records, because they are not precedents of justice, being decided according to the justice and equity of each particular case; and therefore they may themselves be given in evidence,^k independently of any decree. But regularly, in order to prove the facts on which a decree professes to be founded, the proceedings on which it is founded ought to be read in evidence.^l And it has been held at Nisi Prius that a plaintiff cannot give in evidence an order for an injunction obtained by the defendant, restraining him from suing, without producing the bill and answer.^m A decretal order in paper may be read in proof of the bill and answer,ⁿ or without such proof, if they be recited in the order.^o The *decree [*393]

^k Bac. Abr. Ev. F.

^l Bac. Abr. Ev. F. But the bill is no evidence of the facts stated in it, even against the party filing it, they being the mere suggestions of the pleader. *Boileau v. Rutlin*, 2 Ex. 665; see *post*.

¹ Com. Dig. tit. Evid. A. 4. Upon a question as to the right of the deputy oyster-meters of unloading, &c., all oysters brought within the port of London, a decree in equity upon the same right was admitted in evidence, without putting in the depositions, although referred to in the decree, but it was held that when the decree had been put in, either party was entitled to read the depositions; *Layburn v. Crisp*, 4 M. & W. 320.

^m *Per* Lord Abinger at N. P.; *Attwood v. Taylor and others*, 1 M. & G. 279; E. C. L. R. 39; but see *Blower v. Hollis*, 1 Cr. & M. 393.

ⁿ Com. Dig. Ev. C. 1.

^o Com. Dig. Ev. C. 1, *Wheeler v. Lowth*, there cited; but see 1 Keb. 21. And in the *Wharton Peerage case*, 12 Cl. & F. 995, a decree grounded on the admission in the answers, and containing the whole substance of the bill and answer, was admitted to prove the identity of a person through whom the claimant traced his descent. But see *Attwood v. Taylor*, 1 M. & G. 279, *supra*; E. C. L. R. 29. It has been said, that if a party wish to avail himself of the decree only, and not of the answer, he may give the decree in evidence under the seal of the court, and enrolled, without producing the answer; and the opposite party will be at liberty to show that the point in issue was not the same as the present issue; B. N. P. 235. And as a general rule, the whole record ought to be produced; Com. Dig. Ev. A. 4. So in proof of a sentence in the Admiralty Court on a libel and answer,

itself is proved either by means of an exemplification, an examined copy, or decretal order in paper.^p

A sentence of the Spiritual Court of a divorce *à mensâ et thoro* has been received as evidence, without proving the libel and other proceedings.^q But a decree of the Court of Arches for alimony is not admissible, without proof of the proceedings in the suit; and where a suit is removed upon appeal to the Court of Arches, the judgment of that court is not admissible, without showing that court to be duly in possession of the suit, by producing the transcript of the proceeding sent from the court below.^r The minute book of the Ecclesiastical Court is evidence of a decree for alimony pronounced in that court, although no decree be drawn up: nothing in practice being done with the minutes unless the alimony be not paid.^s

The probate of a will consists of a copy ingrossed upon parchment, under the seal of the Ordinary, with a certificate of its having been duly proved.^t A probate is therefore good evidence of the will, as to the personal estate.^u

*394] When administration is granted by the Ecclesiastical Court, it does not grant an exemplification, but only a certificate that administration was granted.^x And therefore, when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence.^y So would be the book of the Ecclesiastical Court, wherein was entered the order for granting administration.^z So the original book of acts, directing letters of adminis-

or the judgment of a court baron, the proceedings ought to be produced; Com. Dig. tit. Evidence, C. 1. Where the mere object is to prove the fact that a decree was made, or made and reversed, and not to prove the contents, proof of the previous proceedings is not necessary; *Jones v. Randall*, Cowp. 17. And see *per Bayley, B.*, in *Blower v. Hollis*, 1 Cr. & M. 396. And in the case of an ancient decree, where the bill and answer have been lost, the decree alone is admissible.

^p Com. Dig. Ev. C, 1; see *Blower v. Hollis*, 1 Cr. & M. 393.

^q *Stedman v. Gooch*, 1 Esp. C. 4. Lord Kenyon, C. J., and afterwards in K. B.

^r *Leake v. Marquis of Westmeath*, 2 M. & Rob. 394. *Per Tindal, C. J.*, apparently overruling, *Stedman v. Gooch*.

^s *Houlston v. Smyth*, 2 C. & P. 25; E. C. L. R. 12; see *R. v. Yeoveley*, 8 Ad. & E. 806; E. C. L. R. 35. The practice of the court is proveable by oral evidence; *Beaurain v. Scott*, 3 Camp. 388.

^t 3 Bac. Abr. tit. Executors; B. N. P. 246. ^u B. N. P. 246.

^x B. N. P. 246. *Knapton v. Cross*, 8 Geo. II., K. B.; Bac. Abr. Ev. F.; 1 Lev. 25.

^y B. N. P. 246.

^z *Ibid.* and *Elden v. Keddell*, 8 East, 187; Bac. Abr. Ev. F. 631; *Polhill v. Polhill*, A. D. 1701.

tration to be granted with the Surrogate's fiat, is evidence of the title of the party to whom administration is directed to be granted, without producing the letters of administration themselves, notwithstanding subsequent letters of administration granted to another, the first not being recalled.^a So an examined copy of the act-book, stating that administration was granted to the defendant, is proof that he was administrator, in an action against him, as such, without notice to produce the letters of administration.^b So the act of the court indorsed upon the will is as good evidence with respect to the title of personalty as the probate itself.^c But although the probate of the will has been produced, the will itself cannot be read in evidence upon the mere production of it by the officer of the Ecclesiastical Court,^d without some indorsement upon it for the purpose of authentication. In an action against an executor for money had and received, after notice had been [*395 proved to produce the probate, it was held that the original will produced by the officer of the Ecclesiastical Court, and bearing the seal of that court, and indorsed as the instrument on which the probate was granted, with the value of the effects sworn to, was admissible as secondary evidence.^e Where a probate has been lost, an examined copy is evidence to prove the party to be the executor, for the probate is an original document of a public nature.^f

^a *Elden v. Keddell*, 8 East, 187.

^b *Davis v. Williams*, 13 East, 232; *Kay v. Clarke*, *ibid.* 238.

^c *Denn v. Barnard*, Cowp. 595. Where by the practice of the Ecclesiastical Court no book was kept, but a memorandum only indorsed or entered at the foot of the original will by the officer of the court, it was held, that the production of the will with such memorandum was sufficient evidence of the executor's title; and also, that an exemplification of several letters of administration relating to the same estate on one parchment, with one 3l. stamp, was sufficient; *Doe v. Gunning*, 2 Nev. & P. 260; 7 Ad. & E. 240; E. C. L. R. 34.

^d *R. v. Barnes*, Stark. C. 243; E. C. L. R. 2; *per* Raymond, C. J., in *Coe v. Westernham*, Norfolk Summer Assizes, 1725; Sel. N. P. 11th ed. 814. "I cannot allow the original will to prove property in the executor; the probate must be produced, for perhaps the Ecclesiastical Court will not allow this to be the testator's will. Besides, until probate, a man dies intestate; and if his executor die before probate, his executor shall not be executor to the first testator."

^e *Gorton v. Dyson*, 1 B. & F. 219; E. C. L. R. 5; and *qu.* whether it would not be good original evidence. The probate-act book, containing an entry that the will was proved and probate granted, was held to be the original, and primary evidence; and, therefore, to be sufficient proof that the parties were executors, although the probate was not produced, nor any excuse offered for its non-production; *Cox v. Allingham*, 1 Jac. 515; and see *Garrell v. Lister*, 1 Lev. 25.

^f *Hoe v. Nelthrope*, 3 Salk. 154; *R. v. Haines*, Skinn. 584. In *R. v. Haines*,

In such case it is the practice of the Ecclesiastical Court to grant, not a second probate, but an exemplification only.⁵

Although it be a general rule that the probate or ledger-book be no evidence, except in relation to the personal estate, yet the ledger may in some instances be secondary evidence as to a devise of real estate; as where, in an avowry for a rent-charge, the avowant could not produce the will under which he claimed, that belonging to the devisee of the land; but producing the Ordinary's register of the will, and proving former payments, it was holden to be sufficient evidence against the plaintiff, who was devisee of the land charged.^h

*396] Since the ledger-book is *a roll of court, it seems that a copy is admissible evidence.ⁱ Although a probate be no evidence to prove the contents of a will, in order to establish a pedigree, since it is but a copy, and the seal of the court does not prove it to be a true copy, unless the suit relate only to the personal estate; yet the ledger-book, it seems, in such cases is admissible evidence, as being a roll of court, and made under the authority of the Spiritual Court, to prove such a relation.^k

To prove that the probate has been revoked, an entry of the revocation in the book of the Prerogative Court, which is the record of the proceedings of the court, is good evidence.^l

A judgment of an inferior court, not of record, is usually established by the production of the book containing the minutes of the proceedings of the court from the proper place of deposit, proved to be such by oral testimony. Copies of court-rolls, and of proceedings in the Ecclesiastical and inferior Civil Courts, are also evidence, since the originals are public documents.^m And it is said, that it is not usual for inferior courts to draw up their records in form, but only short notes, copies of those short notes

*397] are good evidence.ⁿ It appears also, that in the *case of an

Comb. 337, Holt, C. J., said, that a copy of a probate was not evidence, because it was a copy of a copy.

⁵ *Shepherd v. Shorthose*, Str. 412.

^h Ca. K. B. 375; B. N. P. 246.

ⁱ B. N. P. 246, where it is said that the contrary had been often ruled, on the mistaken ground that the ledger was a copy.

^k B. N. P. 246; *R. v. Ramsbottom*, 1 Leach, C. C. L., 25, in note.

^l *Ibid.*

^m 12 Vin. Abr. A. b. 26, pl. 49. By the County Courts Act, 9 & 10 Vict. c. 95. s. 111, the book kept by the clerk, or a copy of any entry in it purporting to be signed and certified as a true copy by the clerk, and sealed with the seal of the court is declared to be evidence of the proceedings and their regularity.

ⁿ *Per* Hale, in *R. v. Haines*, 12 Vin. Abr. A. b. 26, pl. 49; Comb. 337;

inferior court, such as a Court-baron, Hundred, or County Court, evidence should be given of the proceedings,^o previous to the judgment, as well as of the judgment itself,^p in order to show that the proceedings were regular. In an action for a malicious arrest, on process out of the Sheriff's Court in London, it was held that, in order to prove the averment that the former suit was wholly ended, &c., it was sufficient to show an entry in the minute-book of "withdrawn by the plaintiff's order," opposite to the entry of the plaint, and to prove that it was the course of the court to make such an entry upon an abandonment of the suit by a plaintiff.^q

It has been said that when actions are brought against justices of the peace, they must show the regularity of their convictions, and that the informations upon which their convictions were founded must be produced and proved in Court.^r But it seems that the conviction itself, when proved under the hand and seal (if necessary) of the magistrate, is sufficient evidence that the judgment *which it recites was given.^s In the case of *Massey* [*398 v. *Johnson*,^t it was held that a magistrate might justify by

Fisher v. Lane, 2 B. L. 834, per Lord Tenterden; *R. v. Smith*, 8 B. & C. 341; E. C. L. R. 15. But see *Pitcher v. Rinter*, 12 Vin. Abr. A. b. 48, contra; *Dyson v. Wood*, 3 B. & C. 449; E. C. L. R. 10. As to orders of quarter sessions (not being proceedings on indictments, see ante, p. 267), they may be proved by the minute-book, where no other formal record is drawn up, *R. v. Yeoveley*, 8 Ad. & E. 806; E. C. L. R. 35; *R. v. Mortlock*, 7 Q. B. 459; E. C. L. R. 53; but it should be shown that a more formal record is not kept; *R. v. Ward*, 6 C. & P. 354; E. C. L. R. 25; and see note (p).

^o Com. Dig. tit. Evidence, C. 3; *Fisher v. Lane*, 2 Bl. 834; *Arundell v. White*, 14 East, 216.

^p In *Dawson v. Gregory*, 7 Q. B. 766; E. C. L. R. 53; the judgment of a court baron in a plea of debt was held to have been sufficiently proved by the court book containing a minute of the judgment in the form of a caption, the names of the suitors, judge, and deputy steward, and the parties, with a memorandum in these words: "*Venire facias* executed. Verdict for plaintiff and final judgment entered up for debt, 4*l.* 14*s.* 9*d.*; costs, 16*l.* 10*s.* 10*d.*; total, 21*l.* 5*s.* 7*d.*;" the deputy steward stating that he was present at the trial, and that it was not usual to draw up a more formal judgment, and a *levari facias* having issued reciting a judgment corresponding with the minute. As to the new county courts, see supra, note (m).

^q *Arundell v. White*, 14 East, 216; see *Mackalley's case*, 9 Co. 69, where the brief note of the plaint was as follows: "ss. *J. M. & R. R.* Debt 500*l.* pledges *C. D.* by *R. F.* serjeant," and was held to be sufficient to warrant the arrest.

^r Str. 710. The discussion of this point in such actions, which is one of considerable nicety, seems to be rendered unnecessary by the recent statute 11 & 12 Vict. c. 44, ante, p. 370, note (n). And see Vol. II. tit. JUSTICES.

^s Per Holt, C. J., *Fuller v. Fotch*, Holt. 287; Carth. 346; Hardr. 478.

^t 12 East, 67.

virtue of a conviction of the plaintiff as a vagrant, although the warrant of commitment alleged that the plaintiff had been charged on the oath of *T. S.*, and in fact no charge had been made by *T. S.*, but the defendant had been convicted upon the information of another person, and although the conviction itself was informal. But it was observed, that the case would have assumed a very different shape if there had been no information to ground the conviction.^a In the case of *Gray v. Cookson and others*,^x it was held that the defendants, having jurisdiction over the subject-matter, were protected by a conviction drawn up after the commencement of the action.

By 12 Vict. c. 11, s. 4, on an indictment against a person who has been twice summarily convicted, under the Juvenile Offenders^y and Malicious Injuries^z Acts, a copy of any such conviction certified by the proper officer of the General or Quarter Sessions to which it shall have been returned, or proved to be a true copy, shall be sufficient evidence to prove such conviction.

An Act of Parliament, in making certified copies evidence of the proceedings of a court, does not take away the right of proof by the production of the original.^a

Where the parties have submitted themselves to the jurisdiction of an arbitrator appointed by themselves, his decision, as has been *399] observed, will be conclusive upon the *subject-matter to the extent of his authority.^b In order to establish his award or judgment, it will be necessary to prove his authority by proof of the submission bonds, or other written or parol authority, and to prove the due making of the award.^c And the agreement of submission will not be proved, even by the rule of court under 9 & 10 Will. III., c. 15, s. 1. For the rule of court being an *ex parte* proceeding, and given by the statute merely for the purpose of enforce-

^a *Per Le Blanc, J., ibid.*

^x 16 East, 13. A formal conviction may be drawn up at any time unless a defective one has been quashed, or the party discharged on *habeas corpus*; *Chaney v. Payne*, 1 Q. B. 712; E. C. L. R. 41; *R. v. Turk*, 10 Q. B. 540; E. C. L. R. 59; or perhaps a prior one has been filed at quarter sessions. And see now 11 & 12 Vict. cc. 43 and 44.

^y In England, 10 & 11 Vict. c. 82; in Ireland, 11 & 12 Vict. c. 59.

^z 7 & 8 Geo. IV. c. 30; in Ireland, 9 Geo. IV. c. 56.

^a So held in reference to the Insolvent Act, 7 Geo. IV. c. 57; *Northam v. Latouche*, 4 C. & P. 140; E. C. L. R. 19.

^b *Supra*, p. 349; and see *Doe v. Rosser*, 3 East, 11.

^c See Vol. II. tit. AWARD.

ing performance in a summary manner, the submission by agreement ought to be proved like any other contract.^d

A foreign judgment should be authenticated by an exemplification or copy under the seal of the court.^e In such case it formerly was not sufficient to prove the handwriting of the judge, without also proving that the seal affixed to it is the seal of the court.^f And if a colonial court was proved to have no seal, other proof, as by the signature of the judge, was required to entitle it to credit.^g It is not sufficient to produce what purports to be a copy [under the seal of one who is proved to be clerk of the court.^h A divorce under the seal of a foreign court is not evidence without calling persons to prove the law of the country.ⁱ

^d *Berney v. Read*, 7 Q. B. 79; E. C. L. R. 53.

^e By statute 14 & 15 Vict. c. 99, s. 7, judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or British colony, and all affidavits and other legal documents filed or deposited in any such court may be proved by a copy, but such copy must purport either to be sealed with the seal of the foreign or colonial court, or if it have no seal, to be signed by the judge, or one of the judges of the court, who shall attach to his signature a statement on the copy that the court has no seal, and if the copy purport to be so sealed or signed it shall be admitted without proof of the seal, or signature, or of the truth of the statement attached to it, or of the judicial character of the person signing. See Appendix.

^f *Henry v. Adey*, 3 East, 221; *Black v. Lord Braybrooke*, 2 Stark. C. 7; E. C. L. R. 3; *Appleton v. Lord Braybrooke*, 2 Stark. C. 6; E. C. L. R. 3; 9 Mod. 66; *Alves v. Bunbury*, 4 Camp. 28; *Buchanan v. Rucker*, 1 Camp. 63; *Flinndt v. Atkins*, 3 Camp. 215. If a colonial court possess a seal, it ought to be used, although so much worn as no longer to make any impression; *Cavan v. Stewart*, 1 Stark. C. 525; E. C. L. R. 2.

^g *Appleton v. Lord Braybrooke*; *Alves v. Bunbury*, *supra*.

^h *Appleton v. Lord Braybrooke*; *Alves v. Bunbury*, *supra*.

ⁱ *Ganer v. Lady Lanesborough*, Peake's C. 17. See *Fremoult v. Dedire*, 1 P. Wms. 431; *Henry v. Adey*, 3 East, 221.

¹ Copies of the proceedings or decrees of foreign courts or tribunals though under the hands and seals of the officers of such courts, are not of themselves evidence, but must be proved like other writings; *Delafield v. Hand*, 3 Johns. 310. A copy, certified under the seal of the Secretary of State of the kingdom in which the tribunal exists is inadmissible; it being neither a sworn copy, nor unless it appear that the secretary, has officially the custody of records of that description an office copy; *Vandevoort v. Smith*, 2 Caine's Rep. 155; *Church v. Hubbard*, 2 Cranch, 187. But the copy of a sentence of a foreign court of Admiralty, under the seal of the court, signed by the actuary in the absence of the registrar, accompanied with proof of the seal and signature, was held to be sufficiently authenticated; *Garden v. Columbian Ins. Co.*, 7 Johns. 514. And a copy certified under the seal of the court by the deputy registrar, whose official charac-

A judgment, decree, or sentence, may be impeached by proof, first, that it never existed, or was void *ab initio*;^j secondly, that it was fraudulent and covinous; thirdly, that it has been revoked.

^j No appeal need be made against an order where the justices wanted jurisdiction; unless the object be to bring an action of trespass against them, and the plaintiff does not wish to quash it in Q. B. See *ante*, p. 370, note (n); see Vol. II. tit. SETTLEMENT; or against the proceedings of commissioners, in respect to matters as to which they had no authority; *Attorney-General v. Lord Hotham*, 1 Turn. & Russ. 219.

ter is certified by the judge of the court and that of the judge by a notary public, is admissible; *Yeaton v. Fry*, 5 Cranch, 335. But it is not admissible without the judge's certificate that he is the registrar; *Spigail v. Perkins*, 2 Root, 274.

Foreign judgments are authenticated, 1st. By an exemplification under the great seal. 2d. By a copy proved to be a true copy. 3d. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These are the usual and most proper, if not the only modes of verifying foreign judgments. But if they are all beyond the reach of the party, other testimony, inferior in its nature, may be received. Per Marshall, C. J., *Church v. Hubbard, ubi sup.* If the decrees of the colonies of a foreign country are transmitted to the seat of its government, and registered in the department of State, a certificate of that fact, under the great seal, with a copy of the decree, authenticated in the same manner, would be sufficient *prima facie* evidence. *Ibid.* See *Munford v. Bowne*, Anthon's N. P. Cas. 25.

In *Thompson v. Stewart*, 3 Conn. Rep. 171, it was held that the seal of a foreign court of admiralty need not be proved. The seals of such courts, in cases under the laws of nations, are admitted without further authentication, as they are courts of the whole civilized world, and every person interested is a party. Admitted by counsel on both sides in *Church v. Hubbard, ubi sup.*; Gilb. Ev. 22, 23; 1 Rob. 296.

The public seal of a State or kingdom is noticed judicially by the tribunals of other States, and the record of a judgment authenticated by such seal, need not be accompanied with any certificate of its being a copy under the signature of any officer of the court rendering the judgment; *Griswold v. Pitcairn*, 2 Conn. Rep. 85; *Anon.* 9 Mod. 66; see also *United States v. Johns*, 4 Dallas, 416. But when a civil war rages in a foreign nation, and one part separates itself from the old established government and erects itself into a distinct government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States and before it is by them recognized as an independent government, its seal cannot be allowed to prove itself; but it may be proved by such testimony as the nature of the case admits; *United States v. Palmer et al.*, 3 Wheat. 610; *The Estrella*, 4 Wheat. 298.

What is sufficient evidence to authenticate, in the courts of this country, the sentence or act of a foreign tribunal or government, after a destruction of such government by revolution or conquest; see *Hadfield v. Jameson*, 2 Munf. 53.

First, that it never existed, as by showing that the alleged probate was forged;^k that the testator had *bona notabilia* in another diocese;^l that the testator is still living;^m but not that the will was forged,ⁿ or that the testator was *non compos*,^o or that another is executor,^p for this would be to falsify the judgment.^q Of course it never existed as a valid sentence, if the court had not jurisdiction to enter into the matter.^r In trespass, where the plaintiff had been convicted* upon four convictions, for carrying on his trade, upon the same day, it was held to be a sufficient answer to three of such convictions, that the justices had no jurisdiction, although the convictions had not been quashed.^s An ecclesiastical judge is not liable to an action, though he excommunicate a party erroneously, but it is otherwise if he excommunicate not having jurisdiction.^t So it may be shown that a person is not within the scope of the bankrupt laws, although the commissioners have declared him to be bankrupt.^u But nothing which might have been insisted upon by way of appeal against a sentence can be

^k T. Ray. 404-6; 1 Sid. 359.

^l B. N. P. 247; *Noel v. Wells*, 1 Sid. 359; 1 Lev. 235, *per* Buller, J.; 3 T. R. 131; 5 Rep. 30; *Stokes v. Bate*, 5 B. & C. 491; E. C. L. R. 11; and see *Whyte v. Rose*, 3 Q. B. 493; E. C. L. R. 43; *Lysons v. Barrow*, 2 Bing. N. C. 486; E. C. L. R. 29; *Huthwaite v. Phaire*, 1 M. & G. 159; E. C. L. R. 39.

^m *Allen v. Dundas*, 3 T. R. 129.

ⁿ But upon an indictment for forging a will, it may be proved that the will was a forgery, notwithstanding the probate; *R. v. Buttery and Macnamara*, R. & R. C. C. 342. Indeed, this may be proved in any legal proceeding, civil as well as criminal, for any purpose but that of impeaching the title of the executor, upon which the decision of the ecclesiastical court is conclusive. In the case of an inferior court not of record, the party may show that the cause of action did not arise within the jurisdiction; *Herbert v. Cooke*, Willes, 36, note (a).

^o *Marriot v. Marriot*, 1 Str. 671.

^p *Stirling's case*, 20 How. St. Tr. 473.

^q 1 Lev. 235; 2 Keb. 337.

^r *R. v. Bolton*, 1 Q. B. 66; E. C. L. R. 41.

^s *Crepps v. Durden*, Cowp. 640. But see, as to an action against the justices, 11 & 12 Vict. c. 44, *ante*, p. 370, note (n).

^t *Ackerley v. Parkinson*, 3 M. & S. 411. See also *Moody v. Thurston*, 1 Str. 481; Vol. II. tit. JUSTICES. *Brown v. Bullen*, 1 Doug. 407. *Lord Radnor v. Reeve*, 2 B. & P. 391.

^u In strictness, the reason why the adjudication of the commissioners in such cases is not obligatory, is, that it is merely an *ex parte* proceeding, and partakes no more of the nature of a judgment, than the finding a bill of indictment by a grand jury. Unless, however, it be contested within certain periods, the announcement in the Gazette is now rendered conclusive in certain cases, by stat. 12 & 13 Vict. c. 106, s. 233.

urged in answer to the evidence supplied by the sentence;^x and, therefore, where upon an indictment for assaulting a gentleman commoner, and expelling him from the gardens of a college, the defendant relied upon a sentence of expulsion, it was held to be no answer, that a sufficient number of members had not concurred in the sentence. So it may be shown that commissioners having *402] *especial power by an inclosure act to make an award have not pursued that power.^y Secondly, that it was fraudulent or covinous, for strangers ought not to be bound by such a proceeding.^z Accordingly, in the *The Duchess of Kingston's case*, it was resolved that, even admitting the sentence in the Spiritual Court to be conclusive, still the effect might be removed by showing collusion.^a And in a much later case, it was held, that a sentence of divorce from the first marriage, obtained in Scotland by fraud on the part of the husband, would be no bar to a prosecution for bigamy.^b In an action for assault and wounding the plaintiff, it may be shown that an acquittal upon an indictment charging the injury as a felonious wounding, was fraudulent and collusive.^c So where an executor pleads judgments recovered, the plaintiff may reply that they are covinous.^d So a stranger to a fine or recovery

^x *R. v. Grundon*, Cowp. 315. The case was put on the same footing with a decree in the Admiralty Court, which must stand till reversed. Note, the court doubted whether Mr. *Crawford*, the prosecutor, was a member of Queen's College, but held, that even if he were, the sentence was not examinable but by appeal to the visitor, and that the King's courts could not interfere. As to the general principle that a sentence by the members of a college, or by the visitor on appeal, is conclusive, see *Phillips v. Bury*, Skin. 447; 2 T. R. 346; *Dr. Patrick's case*, 1 Lev. 65; *Dr. Wedrington's case*, 1 Lev. 23; *Case of New Coll.* 2 Lev. 14; *Reg. v. Governors of Darlington School*, 6 Q. B. 682; E. C. L. R. 51.

^y *Rex v. Washbrooke*, 4 B. & C. 732; E. C. L. R. 10. For the further consideration of the subject of jurisdiction, especially as regards the operation of a judgment or sentence to protect those who had jurisdiction to pronounce it, see Vol. II. tit. JUSTICES.

^z *Meddowcroft v. Huguenin*, 4 Moo. P. C. R. 386. Thus, to a *sci. fa.* against a shareholder in a company, the defendant may plead that the judgment against the company was obtained by fraud; *Philipson v. Earl of Egremont*, 6 Q. B. 587; E. C. L. R. 31; *Bradley v. Eyre*, 11 M. & W. 432; *Same v. Urquhart*, *ibid.* 456.

^a 20 How. St. Tr. 355; 1 Ves. 159; And. 392.

^b *Martin Lolly's case*, Russ. & Ry. C. C. L. 237.

^c *Crosby v. Leng*, 12 East, 409.

^d *Lloyd v. Maddox*, Moore, 917; *Trethewy v. Ackland*, 2 Wms. Saund. 48, *et not.*

may avoid it by showing collusion.^e So if it appear on the face of the proceedings that the party to be affected by a foreign judgment, or by process of foreign attachment, was never summoned, or never had notice of the proceeding.^f But it is a general rule that a person who was a *party to the proceeding,^g or who might have been a party^h to it, cannot show collusion in order [*403 to repel the judgment. Thirdly, that the judgment has been reversed,ⁱ as that letters of administration have been revoked,^k or the probate repealed.^l But an appeal^m or writ of errorⁿ against a sentence is no answer to the sentence; and an attainder standing unreversed, although founded upon an insufficient indictment, is valid and pleadable in bar.^o Other evidence to impeach the truth

^e 11 Str. 262.

^f *Buchanan v. Rucker*, 9 East, 192; *Cavan v. Stewart*, 1 Stark. C. 525; E. C. L. R. 2; *Bruce v. Wait*, 1 M. & G. 1; E. C. L. R. 39; *Frankland v. McGusty*, 1 Knapp, P. C. 274; *Ferguson v. Mahon*, 11 Ad. & E. 179; E. C. L. R. 39; *Henderson v. Henderson*, 6 Q. B. 298; E. C. L. R. 51; *Bank of Australasia v. Nias*, 20 L. J., Q. B., 284; and *ante*, p. 356, *et seq.* It is against natural justice to convict a man without a summons; *R. v. Cotton*, 1 Sess. C. 179; 1 Bott, 486; 1 Burn's J. 254, 23rd ed.; *Doe v. Gartham*, 1 Bing. 357; E. C. L. R. 8; *R. v. Gaskin*, 8 T. R. 309; *Williams v. Lord Bagot*, 3 B. & C. 772; E. C. L. R. 10; in error. The husband need not be summoned in case of a criminal proceeding against the wife; *R. v. Ellen Taylor*, 3 Burr. 1681. In *R. v. Clegg*, Str. 475, an order of bastardy made at sessions set out no summons, but the court said they would presume one.

^g *Prudham v. Phillips*, Str. 2; *Ambler*, 763; *Bessy v. Windham*, 6 Q. B. 166; E. C. L. R. 51; but see *Smith v. Nicholls*, 5 Bing. N. C. 222; E. C. L. R. 35; *Phillips v. Earl of Egremont*, 6 Q. B. 587; E. C. L. R. 51.

^h *Mayo v. Browne*, 11 St. Tr. 213.

ⁱ Where a judgment by default in an inferior court has been removed by *habeas*, the judgment below is not evidence against the defendant; *Bottings v. Firby*, 9 B. & C. 762; E. C. L. R. 17. So where, on a case reserved, the judges held a former indictment, on which the party had been convicted, bad; *R. v. Reader*, 4 C. & P. 245; E. C. L. R. 19.

^k Sid. 359.

^l 3 Lev. 135; but note, such repeal would not invalidate a payment to the executor; *Allen v. Dundas*, 3 T. R. 125.

^m *Bird's case*, 2 Den. C. C. 94.

ⁿ *Hervey's case*, 11 St. Tr. 207, 212; Ann. 11; *Doe dem. Tatham v. Wright*, 10 A. & E. 763; E. C. L. R. 37.

^o 4 Co. 45; 2 Hale, 251; *Price v. Oldfield*, And. 222; 2 Sid. 359. An execution on an erroneous judgment is good till reversed, 1 Ld. Raym. 546. An accessory cannot take advantage of error in the judgment against the principal, 1 Hale, 625; *R. v. Baldwin*, 3 Camp. 265; and see *Holmes v. Walsh*, 7 T. R. 458. Judgment against the husband for treason, not reversed, sufficient to deprive the wife of her dower; *per* Lawrence, J., *ib.*

of a record is inadmissible; it is not competent to a party to prove that a verdict was improperly entered by mistake.^p

*404] Thus far of judgments, decrees, and verdicts. The second *class into which judicial documents are divided consists of inquisitions, depositions, and examinations taken in the course of a judicial proceeding. Such inquests as are of a public nature, and taken under competent authority, to ascertain a matter of public interest, are, upon principles already announced,^a admissible in evidence against all the world. They are very analogous to adjudications *in rem*, being made on behalf of the public; no one is properly a stranger to them; and all who can be affected by them usually have the power of contesting them. In general, where property is vested in the Crown upon an inquest of office, by a coroner, escheator^r or other officer of the Crown, the parties affected by the inquest have a right of traverse reserved to them, or they may proceed by *monstrans de droit*. Upon a finding of *felo de se*, the executor or administrator may remove it into the Court of King's Bench, and traverse it;^s for it would be hard that he should be concluded by an inquisition, which is nothing more than an inquest of office, taken behind his back.^t By the express provisions of many statutes, inquest of office before escheators are required to be held in a public open place, and every one is to be heard in evidence.^u And by the provisions of these statutes the remedy by traverse and *monstrans de droit* has been much enlarged.^x Upon the same principle, upon the execution of a writ of extent, one who claims property in the goods which are in possession of the defendant may assert his claim before the sheriff, and cross-examining the witness *adduced by the prosecutor.^y But still *105] it seems that the finding of a *fugam fecit* by the coroner's

^p *Reed v. Jackson*, 1 East, 355.

^a *Ante*, p. 286, *et seq.* and see the cases there.

^r See as to the writ of escheat, the stat. 1 Hen. VIII. c. 8. The inquisition on such a writ is evidence to show, according to the finding of the jury, that the party died without heirs.

^s 1 Hale, P. C. 416-17; *Barclay's case*, Easter, 45 E. 3; but *Ld. Coke* held otherwise, 3 Inst. 55. Every thing done under it is traversable; *Garnett v. Ferrand*, 6 B. & C. 611; E. C. L. R. 13.

^t According to Lord Hale, 1 P. C. 416, 417. East's P. C. 389.

^u 34 Edw. III. c. 13; 36 Edw. III. c. 13; 1 Hen. VIII. c. 8; 2 & 3 Edw. VI. c. 8; 3 Comm. 260.

^x 3 Comm. 260.

^y *R. v. Bickley*, 3 Price, 454; and the sheriff having refused to permit such interrogatories to be put, the court set aside the inquisition.

inquisition against one who occasioned the death of another, is conclusive," although a jury upon the trial find otherwise;* yet, upon principle, the traverse ought to be admitted in that case as well as upon the finding a party *felo de se*.^b

Since then the usual effect of such inquest of office is to vest the property in the Crown, reserving to the party affected, in most instances, a right of traverse, the consequence seems to be, that such inquisition, standing undisputed and unreversed, would be conclusive as to the right of property, not only as between any claimant and the Crown, but also, as in the case of *Toomes v. Etherington*,^c between any other parties. The plaintiff in that case sued an administrator of *Toomes*, upon a judgment recovered by the intestate against the defendant; the defendant pleaded that the intestate was *felo de se*, whereby the judgment was forfeited; the plaintiff replied a subsequent statute of pardon, to which the defendant demurred, and the judgment was given for the defendant; because by the finding of the inquest the debt and damages were vested in the king, and the statute contained no words of restitution.

Upon an issue *devisavit vel non*, the question was, whether the inquest of the coroner, *super visum corporis*, finding the testator lunatic, was admissible; and the court was divided upon the point;^d two of the judges deeming *it to be inadmissible, because the parties were not the same, the one being a civil and the other a criminal proceeding. But in that case the dissentient judges expressed their opinion that an *inquisitio post mortem* would be admissible, because it was a civil proceeding, and because of the antiquity of it, or as reputation to prove a pedigree;^e and the chief justice cited *Lord Derby's case*, where an *inquisitio post mortem* had been admitted.^f

In *Sergeson v. Sealy*,^g Lord Hardwicke said that inquisitions of

* 1 Wms. Saund. 362, n. 1; *sed vide* 6 B. & C. 627; E. C. L. R. 13; *supra*, note (b).

^a *Ibid.* The jury cannot now be charged to find this, 7 & 8 Geo. IV. c. 28, s. 5.

^b See 1 Saund. 362, n. 1.

^c 1 Saund. 361.

^d The inquest was read at the instance of Pratt, J., although he was of opinion that it was not, in strictness, admissible; because it was an issue out of Chancery, and merely to inform the conscience of the Chancellor; Str. 68.

^e *Jones v. White*, Str. 68.

^f And see B. N. P. 228; and *per* Hardwicke, C., in *Sir Hugh Smithson's case*, *ib.*

^g 2 Atkins, 412. And in accordance with this opinion, from *Faulder v. Silk*, 3 Camp. 126; 1 Collins, 396; 2 Madd. Ch. 576; *Frank v. Smith*, 2 M. & Rob.

lunacy, inquisitions *post mortem*, and others, were always admissible, though not conclusive. In the case of *Burridge v. The Earl of Essex*,^b an inquisition *post mortem*, setting out the tenor of a deed, was held to be evidence of the deed.

An inquisition of lunacy may be considered to be in the nature of a proceeding *in rem*, since it is instituted by the direction of the Lord Chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is entrusted,ⁱ to inquire into the state of the party's mind. In the case of *Faulder v. Silk*,^k Lord Ellenborough, upon a plea of *non est factum* to a declaration on a bond, admitted proof of an inquisition taken on a commission of lunacy, against the obligor (to whom the defendant was executor,) upon which he had been found to be a lunatic; but held that it was by no means conclusive. So such an *inquisition has been
*407] received as evidence in a criminal case, to show the insanity of the prisoner.^l

So other inquisitions taken under proper authority in matters of public concern are admissible in evidence. Thus in the case of *The Queen v. Sutton and others*,^m upon an indictment against the defendant for the non-repair of Kelham Bridge, (under the alleged obligation *ratione tenuræ*,) the defendants tendered in evidence a presentment against the vill of Kelham in the reign of Edward the Third, upon which the defendants had been acquitted, the jury upon that presentment finding, in answer to questions put by the court, that the bridge had been built within sixty years of report of the men of the county passing that way; and as to the question, who of right ought to repair the bridge, having answered that they were ignorant: and it was held that the presentment and finding, which had been removed into Chancery, together with a grant of pontage for the repairs of the bridge, soon afterwards granted by the Crown, were admissible in evidence on the part of the defendants to negative the alleged immemorial liability to repair the

315; *The Irish Society v. Bishop of Derry*, 12 Cl. & Fin. 666; it seems now to be settled that such inquisitions, though evidence, are not conclusive.

^b 2 Ld. Raym. 1292. An *inquisitio post mortem*, and traverse thereon, is evidence, although it be voidable; *Leighton v. Leighton*, Stra. 308; *Ibid.* 1151.

ⁱ 3 P. Wms. 108; and see now the statutes 5 & 6 Vict. c. 84, and 8 & 9 Vict. c. 100.

^k 3 Camp. 126; see *Dane v. Lady Kirkwall*, 8 C. & P. 683; E. C. L. R. 34.

^l *R. v. Bowler*, C. B., June, 1812; *cor. Le Blanc and Gibbs, Js.* See Vol. II. tit. WILL.

^m 8 Ad. & E. 516; E. C. L. R. 35.

bridge. From the judgment in this case, the court appear to have been of opinion that the inquest was admissible as a public proceeding, in which the jury might properly inquire, not only whether the persons charged were, but also in general who, and whether any one, was liable to repairs. An inquisition likewise taken under the stat. 4 Edw. I., was received, although the commission could not be found.^a

But where an inquisition has been taken without legal authority it is inadmissible;° as in *Latkow v. *Eamer*,^p where it was held, that an inquisition by the sheriff to ascertain to whom the goods seized under an execution against A. belonged, was not evidence for A. in an action brought by A. against the sheriff. [*408]

Depositions^q of witnesses,^r although made under *the sanction of an oath, are not in general evidence as to the [*409]

^a *Rowe v. Brenton*, 8 B. & C. 747; E. C. L. R. 15; and see *Bayley v. Wylie*, 6 Esp. C. 85; *Vicar of Kellington v. Trin. Coll.*, 1 Wils. 170.

[°] In *Evans v. Taylor*, 7 Ad. & E. 617, E. C. L. R. 34, a report of a survey by the deputy surveyor of the duchy of Lancaster, stating that the tenants of a particular manor had at a Court of Survey fenced its boundaries, is not a proceeding authorized like that in *Rowe v. Brenton*, by the statute *Extenta Manerii*, 4 Edw. I., and therefore it is not receivable to prove the boundaries. A presentment by a jury under a commission from Oliver Cromwell, apparently as a private individual, is not evidence; *Duke of Beaufort v. Smith*, 4 Exch. 450. But the finding of a jury summoned under a commission from the Duchy Court of Lancaster to ascertain the boundary between two manors is admissible as a verdict, and as reputation to prove such boundary; *Brisco v. Lomax*, 8 Ad. & E. 198; E. C. L. R. 35. But in *The Queen v. Lee*, 10 Ad. & E. 398, E. C. L. R. 37, the Court of Queen's Bench intimated a doubt whether presentments by sewers juries touching liabilities to repair within certain lands could be admitted; and see *ante*, p. 287. In general when the inquisition is of general concernment, the commission under which it was held need not be proved; B. N. P. 228; otherwise the commission must be produced; *Evans v. Taylor*, *supra*, with the same exception as in so many other cases of ancient transactions; *Mayor of Beverley v. Craven*, 2 M. & Rob. 140; *Bayley v. Wylie*, 6 Esp. 85; *ante*, p. 289; and see *Hardcastle v. Sclater*, 2 Gwill. 787; *Anderton v. Magawley*, 3 Bro. P. C. 588.

^p 2 H. Bl. 437; *Glossop v. Pole*, 3 M. & S. 175; *Leighton v. Leighton*, 1 Sho. 308. For this is an inquiry by the sheriff merely for his own information.

^q As to depositions taken before Justices, see 11 & 12 Vict. c. 42, s. 17, and Vol II. tit. DEPOSITIONS. And as to examinations and depositions taken under a commission, see *post*, p. 423, *et seq.*

^r The oral testimony of a witness on a former trial stands upon the same grounds; B. N. P. 242; *Sherwin v. Clarges*, 12 Mod. 343; *Pyke v. Crouch*, 1 Ld. Raym. 730. In *Wright v. Doe dem. Tatham*, 1 Ad. & E. 19, E. C. L. R. 28, the lessor of the plaintiff had filed a bill against the defendant, and an issue at law had been directed upon the question whether A. had devised his lands by the will now in

facts which they contain, unless the party to be affected by them has cross-examined the deponents, or has been legally called upon, and had the opportunity to do so; for otherwise one of the great and ordinary tests of truth would be wanting.^s Evidence of this kind is weak and is not admissible, unless it be the best evidence which can be procured, and also unless the party against whom it is offered, or the party under whom he claims, has had the power of cross-examination, and has been legally called on to examine; which must be proved by showing that he was a party to the proceeding; that it was a judicial proceeding; and that he did cross-examine, or might have done so. There are some exceptions where the proceeding is of a public nature, or the evidence falls within the general scope of the rule as to reputation.

It is an incontrovertible rule, that when the witness himself may be produced, his deposition cannot be read, for it is not the best evidence.^t But the deposition of a witness may be read, not only where it appears that the witness is actually dead, but in all cases where he is dead for all purposes of evidence; as where diligent *410] search has *been made for him and he cannot be found,^u where he resides in a place beyond the jurisdiction of the court,^x or where he has become lunatic or attainted.^y

dispute. At the trial of the issue, *B.*, one of the attesting witnesses, was examined by *Wright* and cross-examined by *Tatham*. *B.* having died before the trial of the second action, his evidence given on the former trial was held admissible on the second, although other plaintiffs were joined with *Wright* in the first, and *Tatham* was the only lessor in the second. In this case a rule of court had been made by consent that the notes of the evidence at the former trial should be read as to such witnesses as were dead or beyond sea. The court held that it was not open to dispute that the evidence of *B.* should be read, his death having been proved. They also held that it was equal in quality to that of the surviving attesting witness. So where the parties and the title were the same, although the lands sought to be recovered were different, the testimony of a witness on a former trial was received at a subsequent trial; *Doe v. Derby*, 1 Ad. & E. 791; E. C. L. R. 28. But identity of title and of one of the parties is not sufficient, the other party not being the same or privy to him; *ib.* 783. It seems that the testimony must be proved (unless by agreement) by the judges' notes, or by a person present who can prove what the witness said; *Mayor of Doncaster v. Day*, 3 Taunt. 262; *Strutt v. Bovingdon*, 5 Esp. 56; *R. v. Jolliffe*, 4 T. R. 290.

^s *Ante*, p. 34.

^t *Benson v. Olive*, Stra. 920; Godb. 193; *Howard v. Tremaine*, Salk. 278; 4 Mod. 146; *Tilley's case*, 286; Hardr. 232; 5 Mod. 163, 277; T. Raym. 336; *Fry v. Wood*, 1 Atk. 45; *Coker v. Farewell*, 2 P. Wms. 563; B. N. P. 239.

^u Godb. 326; Law of Ev. 106; *Benson v. Olive*, Stra. 920.

^x *Lord Altham v. Earl of Anglesey*, Gilb. Eq. Cas. 16, 18; Rep. temp. Holt, 736.

^y The circumstance of attainder, if the witness were accessible to process,

It has even been said, that if a witness, having been subpoenaed, falls sick by the way, his deposition may be read.^a So if the witness had been kept out of the way by the adversary,^a or labour under any infirmity which incapacitates him as a witness.^b So the deposition of a party absent in Ireland has been admitted.^c According *to the practice of the Court of Chancery in directing an issue at law, an order is made that the depositions of wit- [*411 nesses shall be read on the trial, on satisfactory proof that they were unable to attend in person.^d The principal object of the order is convenience in dispensing with the ordinary preparatory proof.^e Where depositions had been taken *in perpetuam rei memoriam*, and a witness afterwards became a party to the suit, his deposition would not formerly be read, for the intent of the deposition was to perpetuate testimony in case of the death of the witness.^f And so it was held, where a deponent became *interested* after

would not now, since the change in the law, render his deposition admissible. It has also been decided that a lunatic may be examined; *R. v. Hill*, 20 L. J., M. C. 222. But proof of temporary insanity will suffice to let in the depositions; *R. v. Marshall*, Car. & M. 147; E. C. L. R. 41; and it would seem, that unless the lunacy was of such a character as to render the witness incapable of giving evidence, his deposition also would not be admissible. In *R. v. Hogg*, 6 C. & P. 176, E. C. L. R. 25, the deposition of an old and bedridden woman was allowed to be read, there being no probability that she would be able to attend at a future assizes. In criminal cases formerly the courts would not admit the deposition of a witness in evidence, whilst any reasonable hope remained that the witness might be able to attend on some future opportunity; *R. v. Savage*, 5 C. & P. 143; E. C. L. R. 24; *R. v. Marshall*, Car. & M. 147; E. C. L. R. 41. And in a civil case, see *per* Lord Ellenborough, *Harrison v. Blades*, 6 Camp. 457; but by stat. 11 & 12 Vict. c. 42, the depositions are made evidence, whenever the witness by reason of illness cannot attend the trial, see Vol. II. tit. DEPOSITIONS.

^a Mod. 283, 284; Ld. Raym. 730; P. Wms. 288-9; Bac. Abr. Ev. F.; Vin. Abr. A. b. 31, pl. 10; 1 Ves. & Beames, 22; *Jones v. Jones*, 1 Cox's Cas. 184.

^b *Green v. Gatewick*, B. N. P. 243; *R. v. Gutteridge*, 9 C. & P. 471; E. C. L. R. 38.

^c B. N. P. 239; *Kinsman v. Crooke*, Ld. Raym. 1166; *Fry v. Wood*, 1 Atk. 145. So it has been said, if the witness be unable to travel. But see the case of *Harrison v. Blades*, 3 Camp. 57; *R. v. Wilshaw*, Car. & M. 145; E. C. L. R. 41.

^d *Lord Altham v. Lord Anglesea*, 11 Mod. 210; Gilb. Eq. R. 16, 18; but see Tr. per Pais, 7th ed. 385, 386, where a distinction is taken between Ireland, and a place out of the King's dominions.

^e *Corbet v. Corbet*, 1 Ves. & Beames, 340.

^f *Palmer v. Lord Aylesbury*, 15 Ves. 176.

^g *Tilley's case*, Lord Raym. 1008; 1 Salk. 286; *Holcroft v. Smith*, Eq. Cas. Ab. 224; Trin. 1702; Vin. Abr. Ev. A. b. 31, pl. 42; *Baker v. Lord Fairfax*, Str. 101. Where a plaintiff in equity appointed a witness his executor, who revived

his examination in a Court of Equity, but was no party to the suit;^g and yet before the recent alteration in the law, if the witness became *interested* by operation of law, the case, with respect to the question of evidence, was the same as if he had become blind or lunatic; and in equity depositions have been admitted under such circumstances.^h Where a witness has been examined on interrogatories by consent, on account of his expected absence, yet if he be not absent at the time of the trial his deposition cannot be read;ⁱ *412] but it is not necessary that he should be actually *on his voyage when the trial comes on; if he be on board and ready to sail, or if the ship has been compelled to put back^k upon a temporary exigency, the deposition is still evidence. Reasonable proof must be adduced by the party who offers the deposition in evidence, to show the necessity of resorting to it.^l The statement of the deposition itself is insufficient.^m Upon an application by the defendant, a trial for misdemeanour has been postponed upon his consenting, by writing under his own hand, to the examination of a witness for the Crown upon interrogatories.ⁿ

Secondly, a disposition is not admissible unless the parties be the suit, his deposition was ordered to be read on such trial; *Andrews v. Beauchamp*, 7 Sim. 65. But now that the party might be examined, under 14 & 15 Vict. c. 99, this difficulty would not arise.

^g *Baker v. Lord Fairfax*, Str. 101.

^h 2 Ves. sen. 42; *Glynn v. Bank of England*; *Holcroft v. Smith*, Eq. Cas. Ab. 224; *Goss v. Tracy*, 1 P. Wms. 287; 2 Vern. 472; *Haws v. Hand*, 2 Atk. 615. In *Glynn v. Bank of England*, 2 Ves. sen. 42, Lord Hardwicke said such evidence was allowable on good reason, for the evidence was to be taken as it stood at the time of the witness's examination, which should not be set aside unless it could be supplied by other evidence.

ⁱ *Proctor v. Lainson*, 7 C. & P. 629; E. C. L. R. 32; 2 Salk. 691; 2 Tidd's Pr. 9th ed. 811. For it is an implied condition that the attendance of the witness is not practicable.

^k *Fonsick v. Agar*, 6 Esp. 92. See *Ward v. Wells*, 1 Taunt. 461; *Varicas v. French*, 2 Car. & K. 1000; E. C. L. R. 61. See the statutes and decisions on them as to such examinations, *post*, p. 429.

^l *Proctor v. Lainson*, 7 C. & P. 629; E. C. L. R. 32. It has been held to be insufficient to show that the witness was a seafaring man, and that several months ago he belonged to a vessel lying in the River Thames, without showing the nature of the vessel, or whither she was bound; *Falconer v. Hanson*, 1 Camp. 171.

^m *Proctor v. Lainson*, 7 C. & P. 629; E. C. L. R. 32. But answers to inquiries are evidence to satisfy the judge; *Burt v. Walker*, 4 B. & A. 697; E. C. L. R. 6; *Wyatt v. Bateman*, 7 Car. & P. 586; E. C. L. R. 32.

ⁿ *R. v. Morphew*, 2 M. & S. 602. The same thing was done upon the trial of *Mr. Hastings*; see 2 M. & S. 603.

same;^o for a stranger to the former suit had ne opportunity to cross-examine, and therefore cannot be affected by the depositions;^p and he cannot use them against one who was a party, because he could not have been prejudiced by them, and therefore, for want of mutuality, ought not to take advantage of them.^q

Accordingly on an appeal of murder an appellant could not give in evidence an indictment for the same murder, and [413 what a witness had sworn upon the trial;^r as the evidence on the indictment was not evidence for the appellant neither was it for the appellee. *A.* preferred his bill against *B.*, and *B.* exhibited his bill touching the matter against *A.* and *C.*; on a trial at law it was held, that *C.* could not use the depositions in the same cause between *A.* and *B.*, but that the whole must be tried as *res nova*.^t The depositions or evidence of a witness in one cause cannot be evidence in another, where the verdict would be inadmissible; for the oath cannot be given in evidence without first giving the verdict in evidence;^u for otherwise it would not appear that the oath was more than a voluntary affidavit. But it is not necessary that the depositions

^o They are admissible against the Crown; as in the *Baron de Bode's case*, 8 Q. B. 208, E. C. L. R. 55, where they were taken under a commission to perpetuate testimony filed against the Attorney-General, and on a petition of right they were admitted on the trial of a traverse of the inquisition taken on that petition.

^p B. N. P. 242; *Cooke v. Fountain*, 1 Vern. 413; 2 Rol. Abr. 679; Hob. 155.

^q Bac. Abr. Ev. F.; *Rushworth v. Pembroke*, Hardr. 472; Gilb. L. of Ev. 55; but see Vin. Abr. Ev. A. b. 31, pl. 47. This principle seems to have been extended to a case where the party against whom the depositions were offered in evidence had himself read the depositions in a former cause. Thus on an issue from Chancery between *A.* and *B.*, it was held, that depositions produced by *B.* in Chancery, in a suit of *C.* against *B.*, were inadmissible; *Atkins v. Humphreys*, 1 M. & Rob. 523; *Brickell v. Hulse*, 7 Ad. & E. 456; E. C. L. R. 34. But see Phill. on Evid. 571, 8th ed. Where on a former trial of the title to the same property on an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence by the latter, the limitations in which were stated in court by the defendant's counsel, a copy of the shorthand-writer's notes of that statement was rejected in another ejectment by the same lessors of the plaintiff against a different defendant, and it was questioned whether it would have been receivable, had the parties been the same; *Doe dem. Gilbert v. Ross*, 7 M. & W. 102.

^r 1 Sid. 235; 2 Haw. 430; 2 Roll's Rep. 460; 2 Keb. 384; Bac. Abr. Ev. F.

^s B. N. P. 243; 1 Sid. 325.

^t Gilb. Law of Evid. 108; Hard. 472; 12 Vin. Abr. 109, pl. 24; *Atkins v. Humphreys*, 1 M. & Rob. 523; *Brickell v. Hulse*, 7 Ad. & E. 456; E. C. L. R. 34.

^u B. N. P. 242; 1 Sid. 325; but see 253, n. (i). It seems to be sufficient to give the *postea* in evidence.

should have been made, or the evidence given in the same proceeding, provided the parties be the same; in the Court of Chancery, depositions in one cause are frequently read in another; and in courts of law, the evidence which the witness gave on a former trial may be *read in a subsequent one, after his death, or *414] while he continues abroad.*

But although the parties are the same, yet if the same matters were not in issue in the former cause, the depositions, it is said, are not evidence;* this rule, however, at all events, does not apply to cases where depositions are offered against those who were not parties to the former suit, as matter of reputation, for there the very circumstances that the same matter was litigated, has been urged as an objection.*

Neither does the objection apply in criminal cases; a deposition made upon a particular charge may frequently be read upon the trial of the prisoner for another. A deposition taken upon a charge of assault and robbery may be read upon a trial for murder, the transaction being the same.^h

*415] *Depositions in a former cause cannot in general be read against one who does not claim under the party with whom such depositions were taken; but in equity, if a legatee bring a bill against the executor, and prove assets, it is said that another

* *Per* Lord Kenyon, 4 T. R. 290; *Pyke v. Crouch*, Lord Raym. 730; *Pitton v. Walter*, Stra. 162; *Green v. Gatewick*, B. N. P. 243; 12 Mod. 319; Barn. 213, 243; *Lord Palmerston's case*, cited by Lord Kenyon, 4 T. R. 290, where upon a trial at bar it was held, on all hands, that what Lord *Palmerston* swore upon a former trial was evidence, the witness having died in the interim; but the evidence was ultimately rejected because the witness could not give the words, but only the fact. In Chancery, depositions taken thirty years ago have been admitted to be read, although the parties were not the same; because they related to the same land, and the tenants were parties to it, and the plaintiff's title did not then appear; B. N. P. 240; Chan. Cas. 73; Bac. Abr. Ev. F.; Eq. Ca. Ab. 627. Formerly depositions *in perpetuum rei memoriam* were not published till after the death of the witnesses, which was attended with inconvenience, because they swore with impunity. Bac. Abr. Ev. F.; and see 7 Ad. & E. 458; E. C. L. R. 34; *Tufton v. Whitmore*, 12 Ad. & E. 307; E. C. L. R. 40. Voluntary oaths, too, are now prohibited by 5 & 6 Will. IV. c. 62. By this Act a declaration in a prescribed form is substituted in many cases for the affidavits formerly in use.

^z *Allibone v. The Attorney-General*, Vin. Abr. Ev. A. b. 31, pl. 45.

^a *Infra*.

^b *R. v. Smith*, 2 Starkie's C. 208; E. C. L. R. 3; and see *R. v. Edmunds*, 6 Car. & P. 164; E. C. L. R. 25; *Radburn's case*, 1 Leach, 457; and Vol. II. tit. DEPOSITIONS.

legatee, although no party, may have the benefit of those depositions;^e at law they may be read where the defendant claims in privity with the defendant in the former suit.^d

Thirdly, in order to admit a deposition, or the oral testimony of a witness in a former cause, it is necessary to show that such a case or proceeding legally existed, for otherwise it would not appear that the deposition was anything more than a mere voluntary affidavit of a stranger.^e It seems to be a general rule, that the depositions or evidence in a former cause are never admissible in evidence, unless the verdict or judgment would in itself be evidence.^f

*It is also a rule, that no extra-judicial deposition can be used in evidence; for the party was not bound to take any [*416 notice of the proceeding. Accordingly, upon an indictment for a libel, depositions before a magistrate were not admitted in evidence, as they would have been under the statutes of Philip & Mary, in cases of felony.^g Nor are they so in any case where the proceeding is *coram non judice*;^h as, where a voluntary affidavit is made

^e *Coke v. Fountain*, Vern. 415; 12 Vin. Abr. 160, pl. 27. A party executed a power of appointing funds in settlement in favour of children; after the death of one, the mother and the survivors executed a voluntary conveyance in favour of children of the deceased, and subsequently conveyed the premises to a purchaser, who filed a bill to set aside the voluntary conveyance, and a bill was also filed to establish the sale, by a partner of the purchaser, alleging the consideration to have been paid in part with his money, and a suit was afterwards filed against the two latter parties to establish the conveyance, and set aside the sale as fraudulent and collusive, in which suit an issue was directed as to the *bona fides* of the sale, and payment of the consideration; held, that on the trial the depositions taken in the first suit by the purchaser were properly rejected; *Humphreys v. Pensam*, 1 Myl. & Cr. 580.

^d *Earl of Bath v. Battersea*, 5 Mod. 9; 12 Vin. Abr. 111, pl. 31. And see 1 Ad. & E. 788, 790; E. C. L. R. 28.

* B. N. P. 242. *Sherwin v. Clarges*, 12 Mod. 343. There is also this objection to it, that its statements had not the penal sanction of an oath.

^f B. N. P. 242. Because giving the verdict, &c., in evidence is a preparatory step; but it seems that the production of the *postea* would be sufficient to warrant the reception of such evidence, since it would show the fact that a trial was had between the same parties. It should seem, however, that where a new trial is granted, and one of the witnesses dies in the meantime, his evidence on the former trial would be admissible, although the verdict itself would be inadmissible; *R. v. Joliffe*, 4 T. R. 290.

^g *R. v. Paine*, 5 Mod. 12; Vin. Abr. Ev. A. b. 31. This was before 7 Geo. IV. c. 64, which extended to misdemeanors. And see 5 & 6 Will. IV. c. 62, which prohibits voluntary oaths.

^h *Stock v. Denew*, Vin. Abr. Ev. A. b. 31, pl. 16.

before the Master,ⁱ such an affidavit would not be evidence, unless the admission of the party who made it would be evidence.^k So if the bill has been dismissed on account of the irregularity of the complaint,^l as if the depositions are taken in a revived suit, where a bill of revivor does not lie,^m for in such a case there is no complaint before the court in which depositions can regularly be taken. But if the bill be dismissed merely because the matter is not proper for a decree in equity, although within the jurisdiction of the court, the depositions may be read in another cause between the same parties.ⁿ Where the proceeding is merely voidable, it seems that the depositions may be read; but it is otherwise where it is absolutely void.^o But in some instances where depositions have been irregularly taken, a Court of Equity will order that they shall stand.^p Voluntary depositions before justices cannot be read on an indictment for treason, or upon the trial *of an appeal or in
*417] a civil action,^q for they are extra-judicial. It was held, that depositions in the Court of Wards were not evidence in the King's Bench to prove the same title.^r

It has frequently been held, that depositions taken in a Spiritual Court cannot be used, even by consent,^s in a court of common law,^t because it is not a court of record. Yet the same objection applies to depositions in Chancery. In *Breedon v. Gill*,^u Lord Holt expressed an opinion that depositions before commissioners of excise might, if the witnesses died, be afterwards read before the commissioners of appeals. And depositions under the statutes of Philip and Mary, and 7 Geo. IV. c. 64, were read upon trials for felony, although they were not of record. And it is to be observed, that these statutes do not expressly direct that these depositions shall be evidence; they were, indeed, originally intended for a different

ⁱ Sty. 446; *May v. May*, K. B. at Bar; Bac. Abr. Ev. F.

^k *Ibid.*

^l 1 Ch. Ca. 175; *Backhouse v. Middleton*, Gilb. Law of Ev. 56.

^m 1 Ch. Ca. 175.

ⁿ *Smith v. Veale*, Ld. Raym. 735; Ch. Ca. 175; 3 Ch. Rep. 72; 12 Vin. Abr. 109, pl. 15; *Noyder v. Peacock*, *ibid.* 112, pl. 41.

^o *Leighton v. Leighton*, Stra. 308. ^p *Murray v. Wise*, cited Stra. 308.

^q 2 Hale's P. O. 286; Ld. Raym. 730; and see *sup.* n. (g).

^r 2 Roll. R. 212.

^s March, 120. *sed quære.*

^t Litt. R. 167; B. N. P. 242; 2 Roll. Abr. 679; Bac. Abr. Ev. F.; 2 Hale, 285; March, 120; 1 Haw. c. 42; Vin. Abr. Ev. A. b. 31. The power of taking depositions has since been enlarged. See Vol. II., tit. DEPOSITIONS.

^u Ld. Raym. 222.

purpose, and they become evidence as authorized proceedings in the course of the same prosecution.^x In *Welsh's case*,^y Lord Hale assigns two reasons why, upon an indictment for a forcible marriage with Mrs. *Puckring*, the deposition of Mrs. *Puckring* before commissioners appointed to dissolve the marriage, if they thought fit, should not be read; first, because it was a proceeding according to the civil law, in a civil cause; secondly, because she was interested; and does not hint that it was an objection that the court was not a court of record. With respect to depositions in the Ecclesiastical Court, C. B. Gilbert lays it down that they may be read when taken in a cause over *which they have jurisdiction, as far as relates to that cause, since they are lawful [*418 oaths, and a man may be indicted for violation of them.^z When, indeed, they are taken in a cause over which they have no authority, as where the realty is concerned, they clearly are not admissible.^a

Fourthly, a deposition is not evidence against one who had not the power or liberty to cross-examine the witness, or does not claim under one who had that power.^b

Accordingly depositions taken before commissioners of bankrupt, being *ex parte*, were not evidence previously to the statutes^c

^x See 2 Hale, 284. In the statute 11 & 12 Vict. c. 42, s. 17, there is an express provision to that effect, which was not contained in the prior Acts.

^y 2 Hale, 285.

^z Gilb. Law of Ev. 60.

^a Gilb. Law of Ev. 60; 2 Roll. Abr. 679; Litt. R. 167; March, 120; and see *post*. p. 434.

^b Hardr. 472, 215; 2 Jones, 164; Wils. 214, 215; Hob. 155; 2 Roll. Abr. 679; 1 Vern. 413. Where barrack commissioners, acting under 47 Geo. III. c. 1, in taking public account, examined witnesses, and put their depositions in writing; and an information having been filed against the defendant relative to certain contracts, the matters were referred to arbitration; held, that the arbitrators could not receive such depositions, having been taken without the defendant having had an opportunity of being present, or of cross-examining the witnesses; *Attorney-General v. Davison*, 1 M'Cl. & Y. 169. The examination of a witness taken before commissioners on an inquiry, cannot be read as evidence on a petition to expunge the proof of a creditor who was not a party to that inquiry; *Ex parte Coles*, Buck, 242; Cogke, B. L. 552, 8th ed.; *Ex parte Campbell*, 2 Rose, 51. On a charge of felony, the magistrate's clerk examined the witnesses before the arrival of the magistrates and the prisoner, and after their arrival they were read over to the witnesses in the presence of the magistrates and the prisoner, and the latter was asked whether he had any questions to put to any of them; Platt, B., reprobated the practice; *R. v. Johnson*, 2 C. & K. 394; E. C. L. R. 61.

^c 5 Geo. II. c. 30, s. 41; 49 Geo. III. c. 121, s. 10. The statute 6 Geo. IV. c. 86, ss. 90, 92, made depositions in bankruptcy, in certain cases, conclusive; and 2

*419] by which they are made evidence in *particular cases.^d In Chancery, the witness was examined *de bene esse*; an answer was put in; but the witness was so ill, that he could not be cross-examined, and before the end of three weeks he died, and all the judges held that the deposition was not evidence.^e So if before the coming in of the answer, the defendant not being in contempt, the witness die.^f Where, however, the defendant is in contempt for refusing to answer, the objection ceases, for it was his own fault that he did not cross-examine the witnesses.^g And in general, where the party has had an opportunity to cross-examine in the *420] course of a regular legal proceeding, and has neglected *to do so, the case is the same in effect as if he had cross-examined.^h

& 3 Will. IV. c. 114, s. 7, made such depositions evidence in certain cases, the deponents being dead. The statute 12 & 13 Vict. c. 106, which repeals these Acts, provides (s. 242) that in the event of the death of any witness deposing to the petitioning creditor's debt, the trading, or act of bankruptcy under any bankruptcy theretofore or thereafter, or under any petition for arrangement, his deposition purporting to be sealed with the seal of the court, or a copy of it purporting to be so sealed, shall be received as evidence of the matters contained in it. See also the stat. 59 Geo. III. c. 12, as to the examinations of prisoners touching their settlements; and the Mercantile Marine Act, *post*, p. 427.

^d 1 Lev. 180; Ld. Raym. 220; T. Jones, 53; *Janson v. Willson*, Doug. 257; *Bowles v. Langworthy*, 5 T. R. 366; 2 Roll. Abr. 679; B. N. P. 242. The depositions of deceased witnesses taken before commissioners of bankrupt, on the opening of the commission, and enrolled by the assignees afterwards appointed, were held not to be evidence against the assignees in an action by the bankrupt; the assignees in such a case having had no opportunity of cross examining the witnesses at a meeting which was strictly private; *Chambers v. Bernasconi*, 1 C. M. & R. 347.

^e *Brown's case*, Hardr. 315; *Dutton v. Colt*, Sir T. Raym. 335; but see Ch. R. 90; Vin. Abr. Ev. A. b. 31, pl. 8. A deposition is not admissible before answer put in, or the party is in contempt, unless he had the opportunity of cross-examining; *Cazenove v. Vaughan*, 1 M. & S. 4. So if the witness be examined without service of the order so to do; *Mulvany v. Dillon*, 1 B. & B. 413; E. C. L. R. 5.

^f Hardr. 215; 2 Jon. 164; 2 Wils. 563; for there the defendant had not an opportunity of cross-examining. In such case the party, it is said, may apply to the Court of Chancery that the deposition may be read, and if the court see cause they will order it; and this order, it is said, will bind the parties to assent, but will not bind the Court of Nisi Prius; Gilb. Law of Ev. 57; B. N. P. 240; 2 Jon. 164.

^g Gilb. Law of Ev. 56; and see *Cazenove v. Vaughan*, 1 M. & S. 4; the observations of Le Blanc, J., *ibid.*; B. N. P. 240; Com. Dig. Ev. C. 4.

^h *Cazenove v. Vaughan*, 1 M. & S. 4. The plaintiffs filed a bill in Chancery for the examination of a witness *de bene esse*, and the defendant did not put in any answer. The plaintiffs gave notice to the defendants of an order obtained from

Evidence given by a witness on the trial of an issue directed by the Court of Chancery is evidence in an action upon the trial of an ejectment after the death of the witness against the lessor of the plaintiff, who was the plaintiff in equity.¹ For the lessor had the power of objecting to the competency of the witness, and the same right of cross-examination, and of calling witnesses to discredit or contradict the testimony of the witness.

Though depositions taken *de bene esse*, before the answer of the defendant, are not, as we have seen, admissible in a court of law, since they are taken before issue joined^{*} yet a Court of Equity will sometimes direct them to be read;¹ but such an order is not binding in a court of law.^m Where, however, upon a bill to perpetuate testimony, the defendant was in contempt, and would not answer, and the plaintiff had a commission, and examined witnesses *de bene esse*, and the defendant joined in the *commission, and cross-examined some of the witnesses produced for the plaintiff, [*421 and before the coming in of the answer the witness died, it was held, after much debate, that the depositions were admissible between the parties on trial at law, for otherwise a bill to perpetuate testimony would be of no use.ⁿ There the defendant joined in the commission, and cross-examined, but the principle seems to extend to all cases where the defendant refuses to answer,^o for otherwise he might wait till all the witnesses were dead, having in the meantime prevented his antagonist from perpetuating their testimony.^p

the court for the examination, and of the questions intended to be put, and examined the witness the same evening, who set off the next day and never returned. The plaintiffs obtained a further order for publication of the deposition, in order that it might be read at the trial, and the deposition was admitted in evidence. And see *M'Combie v. Anton*, 6 M. & G. 27; E. C. L. R. 46; *Gilb. Law of Ev.* 62, 64, 4th ed.; 4 Mod. 146; *Howard v. Tremaine*, Show. 363, *semb. contra*, 1 P. Wms. 414; *Copeland v. Stanton*, B. N. P. 240; *Com. Dig. Ev. C. 4*.

¹ *Wright v. Doe d. Tatham*, 1 Ad. & E. 3; E. C. L. R. 28. Note, that in the suit in equity other persons besides the defendant in the ejectment were co-defendants. So if the parties and title in dispute are the same, though the lands be different; *Doe v. Earl of Derby*, 1 A. & E. 791; E. C. L. R. 28.

^{*} 2 Jones, 164; *Vin. Abr. A. b. 31, pl. 12, 22*; *Dutton's case*, Sir. T. Raym. 335; *Hardr. 315*; 2 P. Wms. 161; *Hall v. Hoddesdon*, 12 *Vin. Abr. Ev. A. b. 31*.

¹ 2 Jones, 164.

^m *Ibid. supra*, note (f).

ⁿ Show. 263, 264; *Carth. 265*; 4 Mod. 147; *Salk. 278*; 12 *Vin. Abr. A. b.*

^o But great stress was laid upon that fact by Grey, J., *Carth. 265*.

^p See *Brown's case*, *Hardr. 315*; *Vin. Abr. Ev. A. b. 31, pl. 23*; *Dutton's case*,

Depositions relating to a custom, or prescription, or pedigree, where reputation would be evidence, are admissible against strangers; for as the traditionary declarations of persons dead would be admissible, *a fortiori* their declarations on oath are so.^a Where, however, depositions relate precisely to the same issue,^r and are made *post litem motam*, they cannot be received.^s On the trial of a question between the lord of a manor and a copyholder, as to a custom insisted upon by the lord in respect of copyholds granted for two lives, that the surviving life should renew, paying to the lord such fine as should be set by the homage to be equal to two years' improved value, it was held, that depositions in an ancient suit, instituted against a former lord of the manor by a person who claimed to be admitted to a copyhold for lives, upon a custom for any *422] lives copyhold tenant for life or lives to change or fill up *his paying to the lord a reasonable fine, to be set by the lord or his steward, and which depositions were made by witnesses on behalf of the copyholder, were admissible evidence for the lord, as depositions of persons standing *pari jure* with the new copyholders; it was not proved that the persons making such depositions were copyholders, but it appeared from the depositions themselves that they were such, or that they were persons acquainted with the custom of the manor. And it was held that their depositions, supposing them to be admissible only as declarations of persons deceased, were not admissible on account of their having been made *post litem motam*, because the custom was not in controversy in the former suit as in the latter.^t Where, however, the *lis mota* was on the very point, the depositions and declarations of persons in respect of it would not be evidence, since it is doubtful whether the deposition of witnesses selected and brought forward to support one side of the question, and who partake of the feelings and prejudices

T. Raym. 335; Vin. Abr. Ev. A. b. 31, pl. 12; and the observations in *Cazenove v. Vaughan*, 1 M. & S. 4.

^a B. N. P. 230; *Cort v. Birkbeck*, Doug. 219; and see the expressions of Lord Ellenborough in *Freeman v. Phillips*, 4 M. & S. 491.

^r Case of the *Berkeley Peerage*, 4 Camp. 401; case of the *Banbury Peerage*, *infra*, p. 439, note (c); *R. v. Cotton*, 3 Camp. 444; 4 M. & S. 486.

^s *Freeman v. Phillips*, 4 M. & S. 486.

^t *Freeman v. Phillips*, 4 M. & S. 486. But see *Banbury Peerage case*, 2 Sel. N. P. 763, *infra*, p. 439, where the depositions, although purporting therein to be made by relations, were held not admissible without proving *aliunde* the fact of the relationship of the deponents; and see *Davies v. Morgan*, 1 C. & J. 591; *Monkton v. Attorney-General*, 2 Russ. & M. 161.

belonging to that side, can be depended upon as those of fair and impartial witnesses.^a And depositions, in a suit, claiming a ferry both ways, made after interlocutory orders for preserving the *status quo* until a final decision could be had, which decision was never made, were held inadmissible as evidence of reputation to prove a distinct ferry each way.^x

In the case of *Tooker v. The Duke of Beaufort*, the depositions, as well as the return to the Exchequer under a commission to inquire whether the Prior of St. Swithin or the Crown was seised of certain lands upon the dissolution of the priory, were held to be admissible in evidence, and *the depositions seem to have been considered as standing on the same footing with the return [423
itself.]

A deposition between any parties is evidence to contradict a witness,^z but it is not evidence to support the testimony of a witness.^a

Formerly the courts of common law possessed no direct^b power

^a See the observations of Bayley, J., 4 M. & S. 495.

^x *Pim v. Curell*, 6 M. & W. 234.

^y *Burr*. 146.

^z 12 Mod. 318; 2 Haw. 430, s. 9, 12; 2 Keb. 384; Bac. Abr. Ev. F.; see *R. v. Buckworth*, Raym. 170. A former deposition of the witness may be used to impeach his testimony, by showing omissions or variances which affect his capacity or honesty, but according to *The Queen's case*, and *Bastard v. Smith*, 10 A. & E. 213; E. C. L. R. 37, the deposition must be produced and shown to the witness. And see the resolutions of the Judges in criminal cases, *ante*, p. 229. An examined copy is sufficient for this purpose; *Highfield v. Peake*, M. & M. 110; E. C. L. R. 22. And see *Davies v. Davies*, 9 Car. & P. 252; E. C. L. R. 38; *Ever v. Ambrose*, 4 B. & C. 25, *ante*, p. 227; E. C. L. R. 10.

^a What a man himself who is living has sworn at one trial can never be given in evidence at another to support him, because it is no evidence of the truth; for if a man be of that ill mind to swear falsely at one trial, he may do the same at another, on the same inducements, B. N. P. 242.

^b The only course was to file a bill in equity; see *Bridges v. Fisher*, 1 Bing. N. C. 510; E. C. L. R. 27; *per Tindal, C. J.*, if the other party would not consent to an order being made by the court. But the court frequently coerced the plaintiff into a consent by postponing the trial, unless he acquiesced; *Furly v. Newnham*, Doug. 419; *Calliard v. Vaughan*, 1 B. & P. 210; *Jones v. Brewer*, 4 Taunt. 46; or the defendant by refusing to give him judgment as in the case of a non-suit, *Tidd, Prac.* 852. Whether the Court of Exchequer on the revenue side has such power in revenue cases seems to be very doubtful; *Attorney-General v. Reilly*, 13 M. & W. 676. It certainly has not on the application of the defendant; *Attorney-General v. Bovett*, 15 M. & W. 60; *R. v. Wood*, 7 M. & W. 571; and in the case of a criminal information, *R. v. Upton St. Leonard*, 17 L. J., M. C. 13, or other criminal case, it has no such power. But where the witnesses for a defendant indicted for a misdemeanour resided in Scotland, the court obliged the prose-

of procuring the evidence of witnesses in a cause, who were abroad, likely to die, or to be too ill to attend *the trial, or out of
 *424] the jurisdiction, so as to render it available on the trial against the will of a party. It was therefore provided by stat. 13 Geo. III., c. 63, ss. 40 & 44, that where an action is brought in any of the courts at Westminster, upon a cause of action arising in India, the court^e may award a *mandamus* to the judges of the courts of India for the examination of witnesses; and that the depositions, duly taken and returned, shall be deemed as good and competent evidence as if the witnesses had been sworn and examined *viva voce*.^d The operation of this provision having been found extremely beneficial, the statute 1 Will. IV., c. 22,^e was
 cutor to consent to the examination of the witnesses before one of the courts there; *per* Lord Mansfield, *Mostyn v. Fabrigas*, Cowp. 172; and see *R. v. Morphew*, 2 M. & S. 602, *ante*, p. 412.

^e Under this statute a judge at chambers has no power to award a *mandamus*; and where the case is within this stat., the stat. 1 Will. IV. c. 22, does not apply; *Clarke v. East India Company*, 18 L. J., Q. B. 23.

^d See *Francisco v. Gilmore*, 1 B. & P. 177; *Atkins v. Palmer*, 4 B. & Ad. 377; E. C. L. R. 24. By s. 40 similar power is given in cases of indictments and informations in Q. B. for misdemeanours and offences committed in India, but in an action at the suit of the Crown the court has no power to issue a *mandamus* under this statute; *R. v. Wood*, 9 Dowl. 310. By 1 Geo. IV. c. 101, the evidence of witnesses in India may be obtained, to support a bill of divorce, and in prosecutions for offences committed abroad, by persons employed in the public service, the evidence of witnesses may be obtained under 42 Geo. III. c. 85; *R. v. Jones*, 8 East, 31. And see 54 Geo. III. c. 15, made for facilitating the recovery of debts in the courts of New South Wales.

^e As to the practice under these statutes and the mode of applying for a *mandamus* or commissions, see Archbold's Practice, Interrogatories, and *post*, Vol. II. tit. WITNESS. In this volume it is proposed simply to treat of that which affects the deposition or examination when tendered in evidence. These statutes only apply to oral evidence, and do not authorize the substitution of copies of documents or secondary evidence of their contents for the originals, where they are produced. Thus a witness examined at Madras under the stat. 13 Geo. III. c. 63, gave in evidence certain original accounts; and Lord Denman, C. J., held that copies of them returned with the examinations by the Supreme Court of Madras were not receivable, but that the court should have transmitted the original accounts; *Reg v. Douglas*, 1 C. & K. 670; E. C. L. R. 47. And where a witness, examined on interrogatories abroad, stated the contents of a letter not produced, so much of the answer as related to the letter was rejected, although, the witness being out of the jurisdiction, the production of the letter could not be compelled; *Steinkeller v. Newton*, 9 Car. & P. 313; E. C. L. R. 38. If a witness examined upon interrogatories refers to a document which he describes as a legalized copy of a former deposition made by him, and which he states that he confirms, but which is not authenticated in any way, it is not admissible *Alcock v. Royal Ex-*

passed, which, after reciting the *former Act, provides,^f that these powers shall be extended to all colonies, islands, plantations, and places, under the dominion of his Majesty in foreign parts, and the judges of the several courts therein, and all actions in the superior courts of Westminster wherever the cause of action may have arisen, when it shall appear^g that the examination of witnesses under a writ or commission under the authority thereby given will be necessary or conducive to the administration of justice. It was also thought expedient to extend the operation of the former enactment, and therefore, by s. 4, it is enacted, that the Courts of Law at Westminster, and the Court of Common Pleas of Lancaster and County Palatine of Durham, and the several judges thereof, in every action there depending, may order the examination on oath, upon interrogatories or otherwise, before the master, or other person or persons named in the order, of any witness within the jurisdiction of the court; or order a commission to issue for the examination of witnesses on oath at any place out of the jurisdiction, and by the same or any subsequent order to give directions as to the time, manner, and other matters *connected with the examination.^h A subsequent sec- [*425
[*426

change Insurance Company, 18 L. J., Q. B. 121. But the fact of its appearing on the deposition that the deponent referred to papers not shown to the commissioners will not prevent the deposition being read, *Steinkeller v. Newton*, 2 M. & Rob. 372. As to objections to improper interrogatories or questions, see *post*, pp. 433, 444.

^f Sect. 1.

^g In the construction of this statute it has been held to be immaterial that the action is of a criminal nature, *e. g.* for crim. con.: it is sufficient in order to obtain the commission that the witness is out of the jurisdiction; *Norton v. Lord Melbourne*, 3 Bing. N. C. 67; E. C. L. R. 32.

^h With respect to the mode in which the commissioners must proceed, cross-examinations *viva voce* have been allowed to be made, such examinations being reduced into writing and returned with the commission; *Pole v. Rogers*, 3 Bing. N. C. 780; E. C. L. R. 32. When the commission directed that the examinations should be taken, and *the same* should be returned with the commission, and the commission having been directed to a foreign Court, they had copies of the examinations taken and certified by their officer, and transmitted those copies under the seal of the Court, it was held that they could not be read; *Clay v. Stephenson*, 7 Ad. & E. 185; E. C. L. R. 34. But where the commissioners were directed to reduce the examinations into writing in English, and swear an interpreter to translate the oath, interrogatories, and depositions, the commission was deemed well executed by returning the original depositions in the foreign language as originally taken, and a copy translated six weeks after by the interpreter; *Atkins v. Palmer*, 4 B. & Ad. 377; E. C. L. R. 24. And where a defendant, having obtained an

427] tion,¹ however, provides that no examination or deposition taken under the Act shall be read in evidence at any trial, without the consent of the party against whom it shall be offered, unless it shall appear to the satisfaction of the judge that the witness is beyond the jurisdiction, or dead, or unable, from permanent sickness, or other permanent infirmity, to attend the trial: in which cases the examinations and depositions, certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature of such certificate, be read in evidence, saving all just exceptions. By the Mercantile Marine Act^k also, "whenever in any legal proceeding in England, in respect of any matter in which British consular officers (see sect. 82) have the power of taking depositions, it is proved that a witness who has been examined before such officers abroad, is out of the United Kingdom, or cannot be found or produced on the trial or hearing, his deposition taken before such officers in the matter, and if the proceeding be criminal, in the presence of the party accused, order to postpone a trial till the sittings after Hil. Term, and for a commission, and a commission issued to examine witnesses abroad, but the commission was not returned till the following November, the evidence was held to be inadmissible, and the Court granted a new trial; *Steinkeller v. Newton*, 8 D. P. C. 579. The examination must not be taken till after issue joined; *Mondell v. Steele*, 9 D. P. C. 812. A Judge's order having been obtained by the plaintiff to examine witnesses abroad, the parties agreed upon *A.* and *B.* as commissioners. The plaintiff obtained another order to examine witnesses upon interrogatories without describing the commissioners by their office, or referring to any commission, and the defendant then withdrew the name of his commissioner, and declined to proceed on the ground of the plaintiff's irregularity. The plaintiff subsequently obtained another order *ex parte*, to examine witnesses before *A.* upon interrogatories, and it was held that examinations taken under this order were admissible, although no notice of the time and place of examination had been given to the defendant; *M'Combie v. Anton*, 6 M. & G. 27; E. C. L. R. 46. If however there be any such irregularity as a want of notice of the time and place of executing the commission, preventing the other party from cross-examining, the depositions are inadmissible; *Steinkeller v. Newton*, 9 C. & P. 313; E. C. L. R. 38. So if the order does not pursue the statute, not naming the place of examination, although it be inserted in the commission; *Greville v. Stulz*, 11 Q. B. 997; E. C. L. R. 63. But the order need not be produced, and its not naming the commissioners, or the commission not being tested in term is no objection to the evidence; *Nicol v. Alison*, 11 Q. B. 1006; E. C. L. R. 63. If the witnesses are to be examined apart, this will be presumed to have been done; and it is sufficient to prove that the commission produced is the same that issued, and to identify the signatures of the commissioners; *Simons v. Henderson*, 11 Q. B. 1015; E. C. L. R. 63.

¹ Sect. 10. There is no similar provision in 13 Geo. III. c. 63.

^k 13 & 14 Vict. c. 93, s. 115.

and certified by such officer under his official seal to be so taken, shall be evidence; and if it purport to be so certified, shall be deemed to have been so taken and certified, unless the contrary is proved."

Where a subject-matter is likely to be litigated in future, but cannot be made the subject of immediate investigation, and testimony is in existence which is in danger of being lost, a bill in equity lies to perpetuate the testimony of witnesses, in order to prevent the hardship which might accrue to a party from an investigation at a remote period, when death had deprived him of them.¹ This proceeding* may be resorted to, whether the testimony relates to real estate or a mere personal demand; or is to [*428 be used in support of an action, or of the defence, or in cases of public or private penalties or forfeitures.^m The bill to perpetuate testimony, strictly so called, could formerly be filed only by persons who were in possession under their title, and therefore could not sue at law; if the testimony were required by persons out of possession it was obtained by a bill to take testimony *de bene esse*, but the latter could be filed only when an action was actually depending.ⁿ Hence the 5 & 6 Vict., c. 69, has enacted, that any person who would, under the circumstances alleged by him to exist, become entitled upon the happening of any future event to any honor, title, dignity, or office, or to any estate or interest in any property real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled to file a bill in Chancery to perpetuate any testimony which may be material for establishing such claim or right. Before this statute a bill for a commission to examine witnesses abroad in aid of a trial at law, where a present action might be brought, was held demurrable, unless it averred that an action was pending.^o

¹ See *Angell v. Angell*, 1 Sim. & Stu. 89. The bill will be defective unless it state that the matter in question cannot be made the subject of immediate investigation; *Ibid.*; see also *Dew v. Clarke*, 1 Sim. & Stu. 114.

^m 1 Story, Eq. Jur. 2nd ed. 664.

ⁿ *Ibid.* 666.

^o *Angell v. Angell*, 1 Sim. & Stu. 91. But see *Moodalay v. Morton*, 2 Dick. 652; 1 Bro. P. C. 469; dub. *Phillips v. Carew*, 1 P. Wms. 117. Upon a petition of right a commission issued, and an inquisition was thereupon found and returned into Chancery. Before any other proceeding the suppliant filed a bill against the Attorney-General to perpetuate testimony, reciting the petition, and a commission to examine witnesses issued thereon *ex parte*, the Crown declining to join. The Crown traversed the inquisition, and the record was sent into the Q. B. The Court held that the depositions taken under this commission were taken in a

*429] *Where an old witness has been examined, it is sometimes made part of the rule for a new trial that the judge's note of his evidence shall be read upon the new trial.^p

The court will not grant a *mandamus* to justices of the peace to produce depositions taken on a charge of felony, in order to ground a prosecution for perjury.^q But the magistrate may be subpoenaed before the grand jury, who may found a presentment on his evidence.^r

The preparatory facts must first be proved which warrant the reception of the evidence, as that the witness is dead, insane, or absent, unless lapse of time negative his existence.^s Where a deposition, thirty-nine years old, represented the witness to be sixty, it was held that it could not be read without proof of his death.^t The absence of witness must be proved by some one who can speak to the fact from his own knowledge; therefore, proof of inquiries and the answers in reply to them at his residence, is not enough.^u And proof that on the evening before the trial, he was with his luggage on board a ship bound to Montreal, then three quarters of a mile below Gravesend, waiting for the captain to come on board, will not suffice.^v But in *Varicas v. French*,^a proof by a person that he had prepared the outfit for Australia of a witness examined under a judge's order, and had seen him start by the railway to go on board the ship for that place, which lay at Gravesend; and that he had received two letters from him, one from Sheerness, and the other from Plymouth, was held sufficient, by Coleridge, J., to satisfy him that the witness was abroad; and his examination before the master was read.

*430] *Next it must be proved that such a cause existed,^r in order to show the admissibility of the oath of the witness;

proceeding substantially the same, and were admissible, the witnesses being out of the jurisdiction; *Baron de Bode's case*, 8 Q. B. 208; E. C. L. R. 55.

^p *Shillito v. Claridge*, 2 Ch. 426; and see *ante*, p. 408, n. (r).

^q 1 Chitty, 627.

^r *Ibid.*

^s *Benson v. Olive*, in Scacc. Stra. 920, where the deposition was sixty years old.

^t 1 Ford's MSS. 146; Stra. 920.

^u *Robinson v. Markis*, 2 M. & Rob. 375.

^v *Carruthers v. Graham*, Car. & M. 5: E. C. L. R. 41. See sect. 10; but see also *ante*, p. 412.

^a 2 Car. & K. 1068; E. C. L. R. 61.

^r Where the order for the examination is made under either of the statutes above mentioned, as it will have been made in the action, which the date of the writ on the record will show to have been previously brought, this preliminary proof is unnecessary.

for if no cause existed, the oath was nothing more than a voluntary affidavit.^a And also that it was between the same parties; thus where on a former trial a deed was given in evidence on the part of the defendant, and the limitations in it were stated in court by the defendant's counsel, a copy of the shorthand-writer's notes of that statement was held inadmissible in another action by the same plaintiff against another defendant.^a Although the bare production of the *postea*, without proof of final judgment, be no evidence of the verdict, for judgment may have been arrested, or a new trial granted, yet it is good evidence that a trial was had between the same parties, so as to introduce the evidence of a witness (who is since dead) at the trial.^b And so it is on an indictment for perjury.^c

Where the deposition has been taken in Chancery it is necessary to prove the bill and answer,^d in order to show the existence of a lawful cause, and that the depositions relate to the same matter. And, therefore, exemplified depositions in the Duchy Court were held to be inadmissible, because the answer was not exemplified.^e But where the Court of Chancery makes an order, on directing an issue at law, that the depositions shall be read, proof of *the bill and answer is not necessary.^f And where the bill and answer have been lost, they may be supplied by other memorials.^g And ancient depositions have been admitted without proof of the bill and answer, because formerly they were not enrolled, and were liable to be lost.^h The depositions may be used, although the bill has

^a B. N. P. 242; 1 Raym. 730; 12 Vin. Abr. Ev. A. b. 61, pl. 16.

^a *Doe dem. Gilbert v. Ross*, 7 M. & W. 102.

^b B. N. P. 243; 1 Stra. 162.

^c B. N. P. 243; *R. v. Iles*, M. 14 Geo. II. cor. Raymond.

^d *Dutton's case*, Trial at Bar. Raym. 335; Vin. Abr. Ev. A. b. 31, pl. 12; Gilb. Law of Ev. 56; B. N. P. 240; *Illingworth v. Leigh*, 4 Gwill. 1619; *Byam v. Booth*, 2 Price, 234, n.; *Baker v. Sweet*, Bunb. 91. If the bill is dismissed for informality, see 2 P. Wms. 162.

^e Clay, 9; Vin. Abr. Ev. A. b. 31.

^f *Palmer v. Lord Aylesbury*, 15 Ves. 176; *Corbet v. Corbet*, 1 Ves. & Beames, 340.

^g *Barly's case*, 5 Mod. 210; Vin. Abr. Ev. A. b. 36, pl. 33.

^h 2 Keb. 31; Law of Ev. 113, 65, 2nd edit.; *Byam v. Booth*, 2 Price, 231; *Illingworth v. Leigh*, 4 Gwill. 1615; *R. v. Countess of Arundel*, Hob. 112. Depositions taken under a commission issuing out of the Exchequer cannot be read without producing the commission, unless they are of so long standing as to afford a presumption that the commission is lost; *Bayley v. Wylie*, 6 Esp. 85. But, if the *commission* be produced, it is not necessary to produce the bill and

been dismissed on the ground that the court considered the matter unfit for a decree in equity.¹ Where evidence has been given upon the trial of an issue directed by a Court of Equity, upon a bill filed by a party, it is no objection to the receiving upon the trial of an ejectment between the same parties the evidence of a witness examined on the trial of that issue, that the bill has since been dismissed.² Depositions taken by order of Queen Elizabeth, on petition, without bill and answer, were allowed to be read.¹ Where depositions in a suit in equity are given in evidence at law, and the bill and answer are put in to show that the depositions are admissible, the bill and answer cannot be referred to by the opposite counsel in his address to the jury.^m

In ordinary cases, it seems to be sufficient to prove that the deposition was signed by the Master; but upon an *indict-
*432] ment for perjury the identity of the deponent must be strictly proved.^p

A deposition may be proved by an examined copy; office copies, though admissible in equity, are not admissible in a court of law. Upon the trial of an issue directed by the Court of Chancery to try the validity of an alleged deed of gift, it was held that an office copy of a deposition made by the plaintiff's brother in the suit in equity, and which was proved to have been examined with the original, was admissible to contradict the witness.^p The party reading the deposition must, as part of his own case, read also the

answer upon which the commission was granted; *Ibid.* Of course answers to interrogatories may be used as admissions, although some of the answers are not intelligible of themselves; *Rowe v. Brenton*, 8 B. & C. 765; E. C. L. R. 15.

¹ *Hall v. Hoddesdon*, 3 P. Wms. 162.

² *Wright v. Doe d. Tatham*, 1 Ad. & E. 3; E. C. L. R. 28.

¹ Hob. 112.

^m *Chappell v. Purday*, 14 M. & W. 303.

^p 3 Mod. 116, 117; see tit. PERJURY. Lord Holt, in one case (Ld. Raym. 734), held that it should be proved by the examiner that the depositions were taken on the day of their date.

^o Gilb. Law of Ev. 21; B. N. P. 229; Stark. C. 13.

^p *Highfield v. Peake*, M. & M. 109; E. C. L. R. 22; *coram* Littledale, J., who said, that this being an issue out of Chancery might be considered as a proceeding in that Court, and therefore that the office copy according to the case of *Dunn v. Fulford*, 2 Burr. 1179, might be considered to be good evidence. In the case of *Rees dem. Howell v. Bowen*, 1 McC. & Y. 383, the Court of Exchequer is reported to have held that an examined copy of an affidavit, made for the purpose of obtaining an injunction, was not admissible; but see M. & M. 111; E. C. L. R. 22; *Ewer v. Ambrose*, 4 B. & C. 25; E. C. L. R. 10; *Hennell v. Lyon*, 1 B. & A. 182.

answers to the cross-interrogatories, abandoning the rest.^a But he may read part, where the rest is inadmissible as purporting to state the contents of a letter which is not produced.^r As observed before, upon a trial of an issue at law, directed by the Court of Chancery, depositions will be allowed to be read, under an order of the Court of Chancery, without proof of the bill and answer.^s Such an order is not made for the purpose *of making that evidence which [433 would not otherwise be admissible;^{ss} and depositions under such an order are not admissible without proof at the trial that the deponents cannot attend in person. Where the evidence of a witness upon a former trial is adduced, the evidence itself must be proved on oath, or by the notes of the judge who tried the case.^t And in *Lord Palmerston's case* the evidence was rejected, because the witness could give the effect only of the evidence, and not the words.^u Where a witness on a former trial of an issue out of Chancery died, and a new trial was granted, parol evidence of what such witness had sworn was held to be admissible, notwithstanding an order for reading the depositions in equity of such witnesses as had died since the first trial.^x The copy of the deposition of a person examined upon interrogatories at the Chief Justice's chambers, signed by the Chief Justice, and received from his clerk, must be taken *prima facie* to be a correct copy of what has been sworn by such witness; and the original examination need not be produced, until some suspicion of forgery is thrown upon the signature of the deponent.^y Where the deposition has been taken under the statute 7 Geo. IV., c. 64, it must be shown that the requisites of the statute have been complied with.^z

^a *Temperley v. Scott*, 5 C. & P. 341; E. C. L. R. 24.

^r *Wheeler v. Atkins*, 5 Esp. C. 246. Even although it be part of an entire answer to one question, *Tufton v. Whitmore*, 12 Ad. & E. 370; E. C. L. R. 40; and though the answers state the contents of writings inadmissible in evidence; *M'Intyre v. Layard*, R. & M. 203; E. C. L. R. 21.

^s *Palmer v. Lord Aylesbury*, 15 Ves. 176; *Corbet v. Corbet*, 1 Ves. & B. 340.

^{ss} 15 Ves. 176; but see *Doe v. Wright*, 2 Ad. & E. 3; E. C. L. R. 29.

^t 1 Sid. 325; Law of Ev. 31; Bac. Abr. Ev. F.; *Mayor of Doncaster v. Day*, 3 Taunt. 262.

^u 4 T. R. 296. *Qu.*, whether so great exactness is necessary; even an indictment for perjury sets out the substance only. Where the witness deposing as to what the defendant swore on a trial, stated that he could not swear he had stated all which fell from the prisoner, but would swear that he had said nothing to qualify it; it was held sufficient; *Rowley's case*, Ry. & M. 111; E. C. L. R. 14.

^x *Tod v. Earl of Winchelsea*, 3 C. & P. 387; E. C. L. R. 14.

^y *Duncan v. Scott*, 1 Camp. 100.

^z See tit. DEPOSITIONS, and 11 & 12 Vict. c. 42.

It is no objection at the trial that the interrogatories were leading ones, where the party might have objected^a *to their
 *434] being put, and did not. But answers to improper questions, put upon an examination under 1 Will. IV., c. 22,^b may be objected to and excluded at *nisi prius*, but not by the party who put the questions.

Where the interrogatories to certain tenants at assize session courts, upon proper search could not be found, it was held that the answers might be read, subject to the consideration, whether their effect would not be destroyed by any ambiguity which might arise from the want of those questions.^c

Depositions taken in ecclesiastical causes before courts of competent jurisdiction are admissible on the same principles which warrant the receiving such evidence in other cases.^d There are indeed several cases to the contrary, but as these are founded principally upon the objection that Ecclesiastical Courts are not courts of record, and partly on the objection that their proceedings are governed by the rules of the civil law, it seems to be unnecessary to discuss them at length. The reception of depositions in equity is an answer to the first objection; and, as to the second, it may be answered, that the principles on which depositions in other causes are held to be receivable in courts of common law, are quite independent of the use to be made of such depositions. It is sufficient that the court possess jurisdiction^e such as to warrant the punishment of one who swears falsely, and that the adverse party had due notice and opportunity to cross-examine the witnesses. Upon the same principles, it seems that a deposition before commissioners
 *435] of excise having power to *inquire as to forfeitures, is admissible upon an appeal, in case of the death of the deponent.^f

The third class into which judicial documents are divided consists of documents incidental to judicial proceedings, such as writs, warrants, pleadings, and bills and answers in Chancery.

^a *Williams v. Williams*, 4 M. & S. 497.

^b *Hutchinson v. Bernard*, 2 M. & Rob. 1, or answers which involve inadmissible matter; *e. g.*, the contents of written documents; *Steinkeller v. Newton*, 9 Car. & P. 313; E. C. L. R. 38. But that *part* only of an entire answer will be rejected which involves such matter; *Tufton v. Whitmore*, 12 Ad. & E. 307; E. C. L. R. 40.

^c *Rowe v. Brenton*, 8 B. & C. 765; E. C. L. R. 15.

^d Gilb. Law of Ev. 60. See the cases as to this, *ante*, p. 417.

^e According to the opinion of Lord Holt in *Breedon v. Gill*, 1 Ld. Raym. 219.

Writs and warrants are in general evidence to show the mere fact of their existence, whenever it becomes material, against all the world; for the issuing or existence of a writ is a mere fact. Before the Uniformity of Process Act, when the proceeding was by original, or in the Common Pleas, the writ was evidence to show that the action was commenced earlier than it appeared to have been by the record, which was entitled of the term in which issue was joined.^f Accordingly, where in an action on an attorney's bill in that court, it appeared that the bill had been delivered September 30th, 1797, and the record was entitled of Hilary, 1798, it was held to be incumbent on the defendant to show by the writ that the action had been in fact commenced before the expiration of the month.^g So the plaintiff, in order to save the Statute of Limitations, or a tender, might give in evidence a bill of Middlesex, or *latitat*.^h

Where goods are seized under a *feri facias*, if the *defendant himself bring an action against the sheriff or bailiffⁱ [*436 for seizing, then it will be sufficient for him to prove the writ; but if the action be brought by a person claiming by virtue of a prior execution, or a sale which was fraudulent, the officer must prove the judgment as well as the writ; for, in the first case, by proving that he took the goods in obedience to a writ issued against the plaintiff, he shows that he has committed no trespass; but, in the latter cases, they are not the goods of the party against whom the writ issued, and the officer is not justified in taking them, unless he can bring the case within the stat. 13 Eliz., for which purpose it is necessary to show a judgment.^k For the writ itself is a justification for seizing the goods of the *defendant*; but if those goods be claimed by another under a colourable title, as the officer must show that the act of transfer from the defendant was fraudulent,

^f *Webb v. Pritchett*, 1 B. & P. 263.

^g *Ibid*.

^h 1 Sid. 53; *Dacy v. Clinch*, *ibid*. 60; *Crokat v. Jones*, Str. 734; Ld. Raym. 1441; 2 Burr. 961; 3 Burr. 1243; *Foster v. Bonner*, Cowp. 454. But in the case of writs which have been issued and continued to obviate the Statute of Limitations, the Uniformity of Process Act requires that each writ shall be returned within one month of its expiration and entered of record, and that it shall have a memorandum of the first writ and return indorsed upon it. These facts must be proved, not merely by the production of the writs and the record, but by extrinsic evidence; *Higgs v. Mortimer*, 1 Ex. 711; *Walker v. Collick*, 4 Ex. 171; *Pritchard v. Bagshaw*, 20 L. J., C. P. 161; and see further as to this Vol. II. tit. LIMITATIONS.

ⁱ *Andrews v. Marri's*, 1 Q. B. 3; E. C. L. R. 41.

^k B. N. P. 234.

and therefore void as against a judgment creditor; he must show that a judgment existed. Accordingly, where *A.* brought an action of trespass against the sheriffs, who proved a *feri facias* against the goods of *B.*, but did not prove a copy of the judgment; after a verdict for the plaintiff upon the point reserved, the court held that the judgment ought to have been proved; but because it appeared that the goods were in fact the goods of *B.*, and that his conveyance of them to *A. B.*, himself remaining in possession of them, was fraudulent, the court granted a new trial.¹

Where in ejectment the lessor plaintiff claimed under a sale upon a *feri facias*, in an action by himself against the defendant in ejectment, the court held that he was bound to prove the judgment as well as the writ, being privy to his own judgment.^m In order to *437] prove the *crime of murder against a party who kills an officer in the execution of civil mesne process, it is necessary to prove the writ as well as the warrant from, the sheriff.ⁿ And so it is in case of a justification by an officer in the execution of such process.^o Upon issue taken on a plea of *plene administravit*, proof of an execution is not evidence without the judgment, for without it there appears to be no authority for the execution.^p

As the sheriff is a public officer and minister of the court, credit is given to the statement upon his return, as to his official acts. Thus, in the case of *Gyfford v. Woodgate*,^q in an action for maliciously suing out an *alias feri facias*, after a sufficient levy under the first, it was held, that the sheriff's return upon the two writs, which had been produced in evidence by the plaintiff as part of his case, in which the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the plaintiff himself, were *prima facie* evidence of the facts so returned. So if the sheriff return a rescue, the court will so far give credence to such return as to issue an attachment in the first instance; though upon an indictment for a rescue it

¹ *Martin v. Podger*, Burr. 2631; and see *Lake v. Billers*, Lord Raym. 733; see also *Ackworth v. Kempe*, Doug. 40. But this may be supplied by the plaintiff putting in the warrant or writ, reciting it; *Bessey v. Windham*, 6 Q. B. 166; E. C. L. R. 51; and see *Cobbett v. Grey*, *post*, 446, note (a).

^m *Doe dem. Bland v. Smith*, 2 Starkie, C., p. 199; E. C. L. R. 3. For the effects of writs and warrants, &c., as a justification of the officer, see *Andrews v. Marris*, 1 Q. B. 3; E. C. L. R. 41; and tit. OFFICER, HOMICIDE, &c.

ⁿ *R. v. Mead*, *cor. Wood*, B., 2 Stark, C. 205; E. C. L. R. 3.

^o 3 Lev. 63.

^p *Per Holt, J.*, Tr. per Pais, 227.

^q 11 East, 296.

would be open for the defendant to show that the return was false.^r The sheriff's return, that he has levied, is no proof that he has paid over the money levied to the execution creditor;^s his indorsement on the writ is evidence against himself.^t

The writ either has been returned, or it has not; if it has been returned, it is a record, and should be proved in *the same manner as any other record.^u If the writ has not been [*438 returned, the original should be produced.

A writ, if not returned, is proved by the mere production; when it has been returned, it may be proved by an examined copy.^v The judgment-roll is incontrovertible evidence of all the proceedings which it sets forth, therefore it is evidence of the issuing an *elegit*, and of the return to the writ, in an action for use and occupation, by the plaintiff claiming under an *elegit*.^w When the writ is mere matter of inducement, it may be proved by the production of the writ itself,^x without a copy of the record; for possibly it may not have been returned, and then it is no record; but where a record is the gist of the action a copy from the record is necessary, because that is the best evidence. To prove an allegation, that the defendant issued a writ against *A. B.*, it is not sufficient for the plaintiff to show the entry of a *præcipe* in the filazer's book, and after proving notice to the defendant to produce it, to give in evidence a copy; it should be shown that search was made for it in the treasury, and that after the return of the writ it was in the hands of the defendant.^y The writ of summons however, given

^r *R. v. Elkins*, 4 Burr. 2129.

^s *Cator v. Stokes*, 1 M. & S. 599.

^t See tit. SHERIFF, and *Martin v. Bell*, 1 Stark. C. 413; E. C. L. R. 2.

^u *Vide supra*, p. 257, *et seq.* Thus, in case against the sheriff for a false return to a *fi. fa.* brought in the same court as the original action, office copies of the writ and return (not being also examined copies) were rejected by Lord Denman, C. J.; *Pitcher v. King*, 1 C. & K. 655; E. C. L. R. 47.

^v *Supra*, p. 265.

^w *Ramsbottom v. Buckhurst*, 2 M. & S. 567.

^x B. N. P. 234; Gilb. Law of Ev. 34.

^y *Edmonstone v. Plaisted*, 4 Esp. C. 160. The sheriff's book is not evidence of the contents of a writ; *Russell v. Dickson*, 6 Bing. 442; E. C. L. R. 19. In order to connect the mayor of a corporation, under 5 & 6 Will. IV. c. 76, with the issuing of a warrant under which the defendant's goods had been unlawfully seized, the high constable who executed it was called under a *subpoena duces tecum*. He said that he had deposited the warrant in his office, and had searched for it but could not find it; that he did not know what had become of it; and that the town clerk had access to his office. It was held that secondary evidence might be given of the contents, without calling the town clerk or serving the defendant (the mayor) with notice to produce it; *Fernley v. Worthington*, 1 M. & G. 491; E. C. L. R. 39.

*439] by 2 & 3 Will. IV., *c. 39, has no return day, although it is for some purposes considered as returnable on the day when it was issued.

A bill in equity is always evidence for the purpose of proving as a fact that such a bill has been filed. But a bill in equity is not admissible in any case, even against the plaintiff himself, or those who claim through him, as to any facts alleged in the bill, even although they relate to matters of pedigree.^b In the case of the *Banbury Peerage*, all the judges held that, generally speaking, a bill in Chancery cannot be received as evidence in a court of law to prove any fact, either alleged or denied in such bill, although it relate to matter of pedigree, and be of considerable antiquity, whether the object of the bill be to perpetuate testimony or to obtain relief.^c

^b *Boileau v. Rutlin*, 2 Ex. 665; *Doe v. Sybourn*, 7 T. R. 3; and see *Davies v. Lowndes*, 6 M. & G. 471; E. C. L. R. 46; *Pennell v. Meyer*, 2 M. & Rob. 98; *Taylor v. Cole*, 7 T. R. 3, n. where Lord Kenyon, at the sittings after Hil. Term, 1799, is stated to have held, that a bill in Chancery, filed by an ancestor, was evidence to prove a family pedigree, in the same manner as an inscription on a tombstone, or in a Bible; but see Com. Dig. Ev. C. 2; *Devon v. Jones*, 2 Anst. 505. It was formerly held, that a bill in equity was admissible evidence against the plaintiff in equity where his privity could be proved, although the bill had not been acted on, and without proof of privity if the bill has been acted on; Ch. C. 64, 65; *Snow v. Phillips*, 1 Sid. 221; Eq. Ca. Ab. 227, pl. 1; B. N. P. 235; Fitzg. 196; *Doe v. Syburn*, 7 T. R. 3. But it is now finally settled that the statements in the bill are to be regarded as the mere suggestions of the pleader; *Boileau v. Rutlin*, *supra*.

^c In *The Banbury Peerage case*, 23rd Feb. 1809, (cited 2 Sel. N. P. 712), the counsel for the petitioner stated, that he would offer in evidence certain depositions taken upon a bill (seeking relief), filed in the Court of Chancery on the 9th February, 1640, by *Edward*, the eldest son of the first Earl of *Banbury*, an infant, by his next friend. This evidence having been objected to, and the point argued, the following questions were proposed to the Judges:—

Upon the trial of an ejectment brought by *E. F.* against *G. H.* to recover the possession of an estate, *E. F.*, to prove that *C. D.*, from whom *E. F.* was descended, was the legitimate son of *A. B.*, offered in evidence a bill in Chancery, purporting to have been filed by *C. D.* 150 years before that time, by his next friend, such next friend therein styling himself the uncle of the infant, for the purpose of perpetuating testimony of the fact that *C. D.* was the legitimate son of *A. B.*, and which bill stated him to be such legitimate son (but no persons claiming to be heirs at law of *A. B.*, if *C. D.* was illegitimate, were parties to the suit, the only defendant being a person alleged to have held lands under a lease from *A. B.*, reserving rent to *A. B.* and his heirs); and also offered in evidence depositions taken in the said cause, some of them purporting to be made by persons styling themselves relations of *A. B.*, others styling themselves servants in his family, others styling themselves to be medical persons attendant upon the

*An answer in Chancery is evidence as an admission upon *oath,^d but it is not evidence, except against [*440 [*441

family; and in their respective depositions stating facts, and declaring that *C. D.* was the legitimate son of *A. B.*, and that he was in the family, of which they were respectively relations, servants, and medical attendants, or reputed so to be.

First question: Are the bill in equity, and the depositions respectively, or any, and which of them, to be received in the Courts below upon the trial of such ejectment (*G. H.* not claiming, or deriving in any manner, under either the plaintiff or defendant in the said Chancery suits), either as evidence of facts therein (alleged, denied, or) deposed to, or as declarations respecting pedigree; and are they, or any, and which of them, evidence to be received in the said cause, that the parties filing the bill and making the depositions, respectively sustained the characters of uncle, relations, servants, and medical persons, which they describe themselves therein sustaining?

Answer: Neither the bill in equity, nor the depositions, are to be received in evidence in the Courts below, on the trial of the ejectment, either as evidence of the facts therein (alleged, denied, or) deposed to, or as declarations respecting pedigree; neither are any of them evidence that the parties filing the bill, or making the depositions respectively, sustained the characters of uncle, relations, servants, and medical persons, which they describe themselves therein sustaining.—The Judges further added, that it would not make any difference, in their opinion, if the bill, stated to have been filed by *C. D.*, by his next friend had been a bill seeking relief.

Second question: Whether any bill in Chancery can ever be received as evidence in a Court of law, to prove any facts either alleged or denied in such bill?

Answer: Generally speaking, a bill in Chancery cannot be received as evidence in a Court of law, to prove any fact, either alleged or denied in such bill. But whether any possible case might be put, which would form an exception to such general rule, the Judges could not undertake to say.

Third question: Whether depositions taken in the Court of Chancery, in consequence of a bill to perpetuate the testimony of witnesses, or otherwise, would be received in evidence to prove the facts sworn to, in the same way and to the same extent as if the same were sworn to at the trial of an ejectment by witnesses then produced?

Answer: Such depositions would not be received in evidence in a Court of law, in any cause in which the parties were not the same as in the cause in the Court of Chancery; or did not claim under some or one of such parties. From 2 Sel. N. P. 712.

^d Gilb. Law of Ev. 106; Godb. 326. But although it is evidence against the party making the admission, and those who claim under him, it is not evidence as an admission of the truth of what he states that he heard another person say injurious to his title; *Lord Trimlestown v. Kemmis*, 9 Cl. & F. 780. Nor is a declaration of pedigree made in an answer in Chancery to support a claim of right put forward by the party who made it. Nor, *semble*, if the answer is an answer which has not been filed; *Wharton Peerage*, 12 Cl. & F. 295. An answer in Chancery of the defendant, in a suit instituted against him by the prosecutor, is evidence against him on an indictment for a conspiracy; *R. v. Goldshede*, 1 C. & K. 657; E. C. L. R. 47.

the party who made it, or to contradict his testimony in another cause;^e for, with respect to others, it is *res inter alios*.^f If a man make an answer in Chancery which is prejudicial to his estate, it is not evidence against his alienee;^g *unless, indeed, the plaintiff *442] make it evidence by producing it first.^h As where in an issue out of Chancery to try the terms of an agreement, which was proved by one witness, but denied by the defendant, the witness being dead before the trial, the plaintiff was under the necessity of producing the bill and answer in order to read his deposition, and by that means made the whole answer evidence, and it was read for the defendant.ⁱ So the answer of an infant by guardian cannot be read against him on a trial at law,^j for the law out of tenderness to infants will not permit them to be prejudiced by the oath of a guardian;^k but it seems that the answer of the guardian for the infant may afterwards be used as evidence against himself, for it is the answer of the guardian and not of the infant.^l The same objection does not seem to apply to an answer made by a woman during coverture, if offered in evidence after the death of the husband. In the case of *Wrottesley v. Bendish*,^m the Lord Chancellor said that he

^e *Ewer v. Ambrose*, 6 D. & R. 127; E. C. L. R. 16. An examined copy of the evidence is in such case sufficient; *Ibid.*; *Countess of Dartmouth v. Roberts*, 16 East, 334.

^f *Goodright v. Moss*, Cowp. 591.

^g Salk. 286; B. N. P. 238; although it be made before alienation; *Ford v. Lord Grey*, 6 Mod. 44: but see *Countess of Dartmouth v. Roberts*, 16 East, 334, *infra*, p. 443. An answer in Chancery relating to an advowson, filed by a person formerly seised of it, and through whom the party against whom it was sought to be used claimed, but made twenty years after the former had conveyed away his interest, was held inadmissible; *Gully v. Bishop of Exeter*, 5 Bing. 171; E. C. L. R. 15; and 2 M. & P. 266; E. C. L. R. 17; see *Deady v. Harrison*, 1 Stark. C. 60; E. C. L. R. 2. The distinction seems to be between mere collateral representations and those which possess a legal effect and operate in law, or are acts accompanying the possession, for such, as in the case of tenants, &c., seem to be always admissible.

^h B. N. P. 238.

ⁱ *Bourne v. Sir T. Whitmore*, Salop, 1747.

^j 2 Vent. 72; 3 Mod. 259; *Eccleston v. Petty*, Carth. 79. As to an admission by guardian, see *Cowling v. Ely*, 2 Stark. C. 366; E. C. L. R. 3; and 7 M. & W. 408; 13 M. & W. 646; but see Str. 548. But the answer of a minor by his mother and guardian, may be read against the mother in a cause which she defends in a different capacity. *Beasley v. Magrath*, Sch. & Lef. Rep. 34.

^k Gilb. Law of Ev. 51; 2 Vent. 72; 3 Mod. 259; Carth. 79; Salk. 350; Vern. 60, 109, 110.

^l 3 P. Wms. 237; Carth. 7, 9; *Beasley v. Magrath*, *supra*, note (j).

^m 3 P. Wms. 235.

would give no opinion on the point, whether such an answer would be evidence or not.ⁿ But in the case of *Hodson v. Merest*,^o it was held that the joint answer of *the husband and wife could not be read against the wife. The ground of objection to admitting such an answer seems to be, that the wife was at the time under the dominion of the husband, and not a free agent; but if the answer was adverse to the interest of the husband, a presumption of duress cannot arise. An answer by one defendant is not evidence against another, for no one is bound by the acts or declarations of another without his privity.^p But an answer by one partner is evidence against another as to partnership liabilities, since there is a privity and community of interest, and each, for such purposes, is the agent of the other; since, however this depends on the privity of interest, the partnership must be proved *aliunde*.^q So the answer of a party is evidence against one who claims under him. Thus, in an action for not setting out tithe, copies of a bill and answer, in a suit by the vicar for tithe of hay against *S. L.*, then owner and occupier of the close, and from whom the defendant purchased, denying the vicar's right, and setting up a right in the ancestor of the plaintiff, were held to be evidence against the defendant.^{r1}

ⁿ It was objected, that an answer by the wife, whilst under the power of the husband, would be of no more use than the answer of an infant.

^o 9 Pri. 556; see *Elston v. Wood*, 2 Myl. & K. 678; *Barron v. Grillard*, 3 Ves. & Bea. 166. In *Callow v. Hawle*, 17 L. J., Ch. 71, Knight Bruce, V. C., allowed a married woman's answer, put in by her jointly with her husband, to be read against her as to her separate estate.

^p *Vide* tit. ADMISSIONS; *Wych v. Meale*, 3 P. Wms. 311; 12 Ves. 361. Upon a question of the right of a lord of a manor to wreck, held that the answers of persons, some tenants of the manor, to a commission issued by a former lord, stating the title of the lord, were inadmissible, the right being of a private nature, and the parties making the declaration possessing no peculiar means of knowledge; *Talbot v. Lewis*, 1 Cr. M. & R. 495; 6 C. & P. 605; E. C. L. R. 25.

^q *Vide* tit. ADMISSIONS—PARTNERS; *Wood v. Braddick*, 1 Taunt. 104; *Lucas v. De la Cour*, 1 M. & S. 250; *Grant v. Jackson*, 1 Peake, C. 203; *Pritchard v. Draper*, 1 R. & Myl. 191.

^r *Countess of Dartmouth v. Roberts*, 16 East, 334; although the vicar abandoned the suit, and no decree was made. Lord Ellenborough observed: "This appears to me not to be *res inter alios*, but *inter eosdem acta*, and was not only evidence, but strong evidence against the defendant, who stood in the same place

¹ The answer of one defendant is not in general evidence against his co-defendant; *Field et al. v. Holland et al.*, 6 Cranch, 8; *Grant v. Bisset*, 1 Caine's Cas. in Err., 112; *Clark's Exors. v. Van Riemsdyk*, 9 Cranch, 153; *Leeds v. Marine*

*444] "It is a general rule, that the party who reads an answer makes the whole of it evidence;" for it is read as the sense of the party himself, which must be taken entire and unbroken.¹ Hence, if upon exceptions taken, a second answer has been put in, the defendant may insist upon having that read to explain what he swore in his first answer.² But where the evidence of a witness was read merely in order to show that he was incompetent, the whole was not evidence, but only so much as showed that he was incompetent.³ And where depositions in a suit in equity are given

by derivation of title and legal obligation as the former occupier of the same land; and that former owner, on his oath, in a suit against him by the vicar, has declared that the tithe is due to the rector and not to the vicar; and now that same person *in effect*, (that is, the present owner, who purchased of the former owner the very lands over which tithes are now claimed,) is decrying the title of the rector in favour of the vicar." See also *Benson v. Olive*, 2 Gwill. 701; *Earl of Sussex v. Temple*, 1 Ld. Raym. 310; *Travis v. Chaloner*, 3 Gwill. 1237; *Ashby v. Power*, *ib.* 1259; *Bp. of Meath v. Winchester*, 3 Bing. N. C. 183; E. C. L. R. 32; *Crease v. Barrett*, 1 Cr. M. & R. 932.

¹ *Barne v. Whitmore*, Bac. Abr. Ev. F.; *Earl of Bath v. Battersea*, 5 Mod. 9; *Lynch v. Clerke*, 3 Salk. 153; see *Bermon v. Woodbridge*, Doug. 781, *supra*; and *Partington v. Butcher*, 6 Esp. C. 66; and tit. LIMITATIONS; *Earl of Montague v. Lord Preston*, 2 Vent. 170; *Randle v. Blackburn*, 5 Taunt. 245; E. C. L. R. 1; *Pennell v. Meyer*, 2 M. & Rob. 99. Where the plaintiff *in equity* reads a passage in the answer as evidence of a particular fact, the defendant cannot read subsequent matter, although connected by conjunctive particles, unless it be explanatory of the passage read by the plaintiff; *Davis v. Spurling*, 1 Russ. & M. 68; see also B. N. P. 238; 2 Vent. 194; 1 Ch. Ca. 194; Gilb. Law of Ev. 44.

² B. N. P. 237; *R. v. Carr*, 1 Sid. 418.

³ *Sparing v. Drax*, 27, c. 2, C. B.; Trial at Bar, Bac. Abr. Ev. F. A sufficient reason for this seems to be that it is not evidence in the cause, but for the court only.

Ins. Co. of Alexandria, 2 Wheat. 380; *Hoomes v. Smock*, 1 Wash. 389; *Phoenix v. Assignees of Ingraham*, 5 Johns. 412. But this rule does not apply to a case when the other defendants claim through him or when they are all proved to be partners in the same transaction; *Field et al. v. Holland et al.*; *Clark's Exors. v. Van Riemsdyk*, *ubi sup.*; *Van Riemsdyk v. Kane et al.*, 1 Gallison, 635; see also *Bartlett v. Marshall*, 2 Bibb, 470.

Whenever the confession of any party would be good evidence against another, in such case his answer *a fortiori* may be read against the latter; per Story, J., 1 Gallison, *ubi sup.*; *Kiddie v. Debrutz*, 1 Hayw. 421, S. P. M.

¹ Where an answer in chancery is given in evidence in a court of law the party is entitled to have the whole of his answer read; and it is to be received as *prima facie* evidence of the truth of the facts stated in it—open however to be rebutted by the opposite party; *Lawrence v. Ocean Ins. Co.*, 11 Johns. 269; see *Hoffman et al. v. Smith*, 1 Caine's Rep. 157. M.

in evidence at law, and the bill and answer are put in to show that the depositions are admissible, the opposite counsel cannot refer to the bill and answer in his address to the jury.⁷ For the judge only refers to them for the purpose of determining whether the depositions are evidence by seeing what was in issue in the suit.* Although the whole of an answer must in general be read, the *rule decides nothing as to the credibility of any fact which it contains, and this must depend upon circumstances. Where [445 the answer charges the defendant by the admission of one fact, and also discharges him by the statement of a distinct and further fact, the rule has been said to be, that what is admitted need not be proved by the plaintiff, but the defendant must make out his fact in discharge;⁷ and therefore where the executor, in an answer to a bill by creditors for an account of the personal estate, admitted the receipt of £100, but alleged that it had been given to him by the testator, for his trouble in the testator's business, it was held, that the defendant was bound to make out, by proof, that which he insisted upon by way of avoidance; since it was probable that he admitted the fact out of apprehension that it might be proved, and therefore it ought not so far to profit the party as to give credit to the statement in avoidance. But the distinction was taken, that if the admission and discharge had been one entire fact, as, if the defendant had said that the testator had given him £100, it ought to have been admitted, unless disproved, because nothing of the fact charged was admitted.* In courts of law, however, the rule is, that if a party read the defendant's answer, the effect is to make him a witness in the cause, and to submit the credibility of all the facts stated to the consideration of the jury;* *but it will [446 not, it seems, operate to make a statement evidence which is

⁷ *Chappel v. Purday*, 14 M. & W. 303.

^x *Ibid.*

^y In Equity, B. N. P. 237. Where a party (in equity) reads a passage from the defendant's answer, he reads all the facts stated in that passage; if it refers to any other passage, or facts stated in any other passage, that must be read, but only for the purpose of explaining the former; and if new facts are stated in the passage so referred to, which must in grammatical construction be read for the purpose of explanation, the facts and circumstances so introduced are not to be considered as read; *Bartlett v. Gillard*, 3 Russ. 157.

* B. N. P. 237; *per* Cowper, C., Hil. Vac. 1707.

* *Roe d. Pellatt v. Ferrars*, 2 B. & P. 542. The admissions made must be construed by the court, and the whole admission must be laid before the jury as one entire writing; but they are not bound to believe the whole of it, and ought to be allowed to contrast it with the other evidence in the case; *Baldon v. Walton*,

in itself inadmissible; as where it rests upon mere hearsay by the party who made the answer.^b

A copy of a letter written by the plaintiff's agent, and referred to in an answer by the plaintiff to a bill of discovery filed by another party, in which suit the original letter was not filed, but the copy in question was delivered by the plaintiff's solicitor in the suit for discovery, may be read in evidence without reading the plaintiff's answer.^c

*447] *An answer is proved by producing the bill and answer,^d

1 Ex. 617, decided in *Cam. Scac.* on a bill of exceptions. So, in an action of trespass against two defendants, one of whom was keeper of the King's prison, and the other a secretary of state, the plaintiff, in proof of the alleged acts of trespass, gave in evidence a return by one defendant to a writ of *habeas corpus*, in which that defendant stated that he had committed the acts in question in obedience to certain orders made by his co-defendant. The defendants thereupon called in aid the evidence contained in that document in support of certain pleas of justification; and the court held that the return was evidence for the defendants in support of the pleas, as well as against them in proof of the trespass, and justified a verdict for them upon the pleas of justification; *Cobbett v. Grey*, 4 Ex. 729.

^b See *Roe d. Pellatt v. Ferrars*, 2 B. & P. 542, and the observations of Chambre, J., 2 B. & P. 548; and Parke, B., 1 Ex. 620; *Gilb. Law of Ev.* 44.

^c *B.*, an underwriter, filed a bill of discovery against *A.*, an assured, and *W.*, his agent, who had effected the insurance; *A.* and *W.* put in their answers, in which they referred to a letter written by *W.* on the subject of the insurance. The original was not produced, but to save time and expense it was agreed that a copy should be inspected, which was done, and a copy taken by the underwriter. On an action brought by *A.* against another underwriter, it was held that the latter was entitled to read the copy in evidence without reading *A.*'s answer. For whether it be or be not necessary to read an answer in Chancery for the purpose of making documents evidence which may be annexed to it, the rule would not apply to the case in question, for the letter was not before the Court of Chancery. And Lord Tenterden observed: "I should at present think it a very strong proposition to say that the answer must at all events be read, though having no connection with the case in which the documents are produced; but here, at least, we think the copy in question was admissible without the answer;" *Long v. Champion*, 2 B. & Ad. 284; E. C. L. R. 22. In an action against the sheriff for a false return of *nulla bona* to an execution issued against the goods of *E.*, the latter having filed a bill in Chancery, in which suit an order had been that all letters written by *E. inter alia*, should be brought into court; held, that although the defendant might give in evidence the order as an act of court not affecting the right of either parties, yet that the letters of *E.* were inadmissible without the bill and answer; it not being proposed to put in with them any letter written by the plaintiff in reply, the answer might explain or wholly neutralize the effect of such letters; *Hewitt v. Pigott*, 5 C. & P. 77; E. C. L. R. 24.

^d *Bac. Abr. Ev. F.* The bill ought to be produced, because it may be material to explain the answer.

or admitted copies, or by proof of examined copies.^o In civil cases (it is said) it will be presumed that the answer was upon oath;^f but since the answer in civil cases operates merely by way of admission, it is sufficient to prove it to be the answer of the party, and it is not necessary in civil cases to produce the original answer, and to prove it to have been signed by the defendant.^g If on proof of the copies the names and characters of the parties correspond, that is sufficient *prima facie* proof of the identity of the parties, and the burthen of repelling the presumption lies on the objecting party;^h but it is otherwise in a criminal proceeding on *an indictment for perjury, or an action for a malicious prosecution, which is in the nature of a criminal proceeding.ⁱ [*448

^o *Ewer v. Ambrose*, 4 B. & C. 25; E. C. L. R. 10; *Hennell v. Lyon*, 1 B. & Ald. 182; *Rees v. Bowen*, 1 McCl. & Y. 383.

^f Bac. Abr. Ev. F.; B. N. P. 238, 239; see *Crooke v. Dowling*, 3 Doug. 77; E. C. L. R. 26; *James's case*, 1 Show. 327.

^g *Lady Dartmouth v. Roberts*, 16 East, 334; *Hodgkinson v. Willis*, 3 Camp. 401; *Ewer v. Ambrose*, *supra*; *Highfield v. Peake*, 1 M. & M. 109, *supra*; E. C. L. R. 22; *Studdy v. Sanders*, 2 D. & R. 347; E. C. L. R. 16; *Rees v. Bowen*, 1 McCl. & Y. 383. In the case of *Dartnall v. Howard*, R. & M. 169, E. C. L. R. 21, it was held, that for the purpose of identifying the original answer, of which an examined copy was produced, as the answer of the defendant, a witness who had seen the original was allowed to prove that it was in the handwriting of the defendant, though it was not produced. Although the bill be lost, the answer will still be evidence, as an admission under the defendant's hand; 1 Ford's MSS. 145.

^h *Hennell v. Lyon*, 1 B. & Ald. 182; see 1 Ld. Raym. 154; 2 Bl. 1190. Note, that the defendant in *Hennell v. Lyon* was *Charles Lyon*, sued as the administrator of *Mary Lyon*, and by his plea he had admitted himself to be such administrator, and the copy of the answer showed that the bill was filed against *Charles Lyon*, as administrator of *Mary Lyon*. The judges relied on the coincidence of description, and Lord Ellenborough seems to have considered it as a matter of public convenience to receive such evidence in civil cases without further proof. And see *Greenshields v. Crawford*, 9 M. & W. 314; *Simpson v. Dismore*, 9 M. & W. 47; *Russell v. Smyth*, 9 M. & W. 818; *Smith v. Henderson*, 9 M. & W. 798; *Sewell v. Evans*, *Roden v. Ryde*, 4 Q. B. 626; E. C. L. R. 45. Identity may be evidenced where necessary by proof of the party's handwriting; see *R. v. Benson*, 2 Camp. 508; *R. v. Morris*, 2 Burr. 1189; *Sayer v. Glossop*, 2 Ex. 409; *Dartnall v. Howard*, Ry. & M. 169; E. C. L. R. 21; *Scott v. Lewis*, 7 C. & P. 349; E. C. L. R. 32; *Price's case*, 1 Leach, 323; *Bendy's case*, *ib.* 330; and tit. HANDWRITING—PERJURY.

ⁱ 16 East, 348; *R. v. Morris*, 1 B. & A. 182; *R. v. Benson*, 2 Camp. C. 508; see Vol. II. tit. PERJURY. The fact of swearing may be proved by evidence of the Master's handwriting to the *jurat*, without calling him; *R. v. Benson*, 2 Camp. 508; *R. v. Morris*, 2 Burr. 1189. The *jurat* is evidence of the place where the

But it is sufficient to produce the examined copy^j of the answer of the witness in equity, in order to contradict his testimony, for it cannot be regarded as a criminal proceeding. On proof of search for the bill by the officer in the proper office, and that it cannot be found, the answer has been allowed in evidence without proof of the bill.^k

A man's voluntary affidavit is admissible against himself, and if offered as an affidavit must be proved to have been sworn;^l but proof of the party's signature makes it admissible as a note or letter, without further proof.^m *where an affidavit has been *449] made in the course of a cause, proof that such a cause was depending, and that such affidavit was used by the party, would be sufficient evidence to prove the affidavit in a civil suit.ⁿ A copy of a voluntary affidavit is not admissible in evidence, for it has no relation to a court of justice.^o In order to prove an affidavit of the defendant in the same court in which the action is tried, it is sufficient to prove an examined copy, without proving the handwriting of the party, or that he was sworn.^p

A rule of court under the hand of the proper officer, is itself an original, and may be given in evidence in a legal proceeding in that court without being proved to be a true copy.^q Indeed the copy of the rule given out by the Master is the rule.^r

A judge's order is proved by the order itself, the court being bound to take judicial notice of the signature of the judge,^s or by the rule of court thereon.^t An order, however, of justices of assize

oath was taken; *R. v. Spencer*, Ry. & M. 97; E. C. L. R. 21; but not conclusive *Emden's case*, 9 East, 437. It was held sufficient evidence in *R. v. Turner*, 2 C. & K. 732, E. C. L. R. 61, on an indictment for perjury.

^j *Ewer v. Ambrose*, 4 B. & C. 25; E. C. L. R. 10; or an admitted copy, *Davies v. Davies*, 9 C. & P. 252; E. C. L. R. 38.

^k Gilb. Law of Ev. 49.

^l B. N. P. 238.

^m *Ibid.*

ⁿ *Ibid.* and Show. 297; and perhaps in a criminal proceeding.

^o B. N. P. 338. And therefore a copy of an affidavit made by the defendant in Chancery, of his being worth 2500*l.*, was rejected by Lord Raymond, when offered for the purpose of increasing the damages; and the plaintiff was obliged to send for the original; *Chambers v. Robinson*, B. N. P. 338.

^p *Cameron v. Lightfoot*, 2 Bl. R. 1190.

^q *Selby v. Harris*, 1 Lord Raym. 745.

^r *Still v. Halford*, 4 Camp. 17; *Berney v. Read*, 7 Q. B. 79; E. C. L. R. 53; per Wilde, C. J., *Streeter v. Bartlett*, 7 C. B. 564; E. C. L. R. 62.

^s 8 & 9 Vict. c. 113, s. 2.

^t *Still v. Halford*, 4 Camp. 17; *Berney v. Read*, 7 Q. B. 79; E. C. L. R. 53.

for restitution of premises delivered up to the landlord by order of magistrates, under 11 Geo. II., c. 19, s. 16, is an order, not of the court, but of the individual judges, and therefore is not proved by a certificate signed by the clerk of assize, and stamped with the stamp of his office; and it seems that such orders should be signed by the judges themselves."

Next, as to pleadings in an action at law. Where there
 *are several counts in the same declaration, or several dis- [*450
 tinct pleas, an allegation in one count or plea cannot be insisted upon by the adversary as an admission of a fact for a purpose distinct from the proof of that count, or of the issue upon the plea; for every issue is to be distinctly tried. Thus, upon a declaration in *assumpsit*, by a landlord against a tenant for breach of good husbandry, where there is one count which professes to be founded on a special written agreement, and a second upon an implied contract, the defendant cannot insist upon the first count as evidence that a written contract exists, so as to impose upon the plaintiff the necessity of producing it;* and besides, every different count professes to be founded upon a distinct ground of action. So where a declaration contains two counts, and the defendant pays money into court upon one, which the plaintiff accepts, the defendant cannot read that count and the proceedings thereon to the jury to negative an allegation in the other count.⁷ So in trespass, a plea of justification does not supercede the necessity of proving the trespass, where the general issue is pleaded.⁸ In like manner where particulars of a plea of set-off are given, the plaintiff cannot give them in evidence for the purpose of showing that a payment taken credit for therein disproves a plea of the Statute of Limitations; for the particulars are merely an explanation of the plea.^a

The statements also of a party in a declaration or plea cannot, it seems, be treated as confessions of the truth of the facts stated by him.^b In the absence of an issue founded upon them, they are not evidence in another action, even between the parties; but in certain instances pleadings *may be evidence against a party of
 facts alleged by his adversary. Thus the material facts [*451

^a *The Queen v. Sewell*, 8 Q. B. 161; E. C. L. R. 55.

^{*} By Le Blanc, J., Lancaster Sp. Ass. MSS. C.; *Harrington v. Macmorris*, 5 Taunt. 228; E. C. L. R. 1; 1 Marsh. 53; E. C. L. R. 4; Vol. III. tit. PARTICULARS.

⁷ *Gould v. Oliver*, 2 M. & G. 208; E. C. L. R. 40.

⁸ B. N. P. 298.

^a *Burkitt v. Blanshard*, 3 Ex. 89.

^b *Boileau v. Rutlin*, 2 Ex. 665.

alleged by one party in a pleading, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, are evidence between them,^e and that conclusive; but only if the traverse is found against the party making it.^d Formerly such an admission might arise from passing by a material statement without notice, and hence arose the practice of making protestation. A protestation is defined to be a saving to the party who takes it, from being concluded by any matter alleged or objected against him on the other side, on which he cannot take issue.^e It is "an *exclusion* of a *conclusion* that a party may by pleading incur; it is a safeguard to the party, which keepeth him from being concluded by the plea he is to make, if the issue be found for him."^f A protestation was of no use to the party who took it, unless either the issue was found for him,^g or unless the matter could not have been pleaded.^h Protestations are now excluded by the new rules, but a party is to have the same advantage as if a protestation had been made.

A demurrer to a count or plea is only an admission of the facts *452] which are well pleaded, therefore if it be decided *in favour of the party demurring, it cannot now be used as evidence against him, and a demurrer to one special plea, on which no judgment has been given, cannot be treated as an admission of the facts stated in it to prove another plea.ⁱ A demurrer to a plea in equity is not such an admission of the facts charged, as to be evidence of those facts against the party unsuccessfully demurring, in a subsequent action between the same parties.^k

^e The question whether omitting to traverse a material fact is an admission of that fact for all purposes regarding the issue arising from *that* pleading in that action, is one of the greatest nicety; thus it has been held that to a plea to a count on a bill, that it was obtained by fraud, and the plaintiff took it without consideration, a replication traversing the latter allegation, and omitting any notice of the other, throws on the plaintiff, by way of admission of the inception of the bill in fraud, the necessity of proving consideration in the first instance; *Bingham v. Stanley*, 2 Q. B. 117; E. C. L. R. 42; and *per Alderson, B.*, 13 M. & W. 144; but see *contra per Cur. Edmunds v. Groves*, 2 M. & W. 642; *Bennion v. Davison*, 3 M. & W. 179; *Smith v. Martin*, 9 M. & W. 304.

^d 3 Ex. 681; *Robins v. Lord Maidstone*, 4 Q. B. 811; E. C. L. R. 45.

^e Plowd. 276, b; *Graysbrook v. Fox*, Finch, 359, 361; 2 Wms. Saund. 103, a.

^f Co. Litt. 124.

^g Bro. Prot. 14; Co. Litt. 124; Plowd. 276, b.

^h 2 Wms. Saund. 103, a.

ⁱ *Ingram v. Lawson*, 9 Car. & P. 326; E. C. L. R. 38; but see *Gregory v. Duke of Brunswick*, 1 Car. & K. 24; E. C. L. R. 47.

^k *Tomkins v. Ashby*, Mood. & Mal. 32; E. C. L. R. 22.

III. *Mixed Documents.*

Documents which are partly of a public and partly of a private nature, are court rolls, corporation books, and perhaps also within the same class may be included the books of some joint-stock companies. These, with respect to a particular class of society, may be considered as public documents, because they proceed from an authority which it recognizes; but, with respect to the rest of the community, they may be nothing more than mere private documents, resulting from no acknowledged authority.

Court rolls and customaries of manors are evidence between the lord and the tenants, for they are the public rolls by which the inheritance of every tenant is preserved; and they are the rolls of the Manor Court, which was formerly a court of justice.¹ Such documents handed *down from remote times, and kept in the muniments of the manor, are not, as far as regards the [453 tenants of the manor, to be regarded as *res inter alios acta*; they are documents to which all are privy. Custom is of the very essence of a copyhold tenure; and as reputation is evidence to prove a custom,^m so are those documents which contain the solemn adjudications or opinions of the homagers or tenants themselves, as to customary rights, or which have been handed down from one generation to another, and reputed to contain a true account of the manorial customs.ⁿ Hence entries upon the court rolls are evi-

¹ Gilb. Law of Ev. 235; 4 T. R. 670; see tit. JUDGMENTS. Ancient presentments are not evidence for the lord, unless signed by a party in privy of estate with the person against whom they are produced; *Benett v. Coster*, Burrough, J., Wilts Sum. Ass. 1817. Presentments by the homage, restricting the lord's right, in respect of parcel of his demesne land, to turn so many cattle only on the waste, not acted on, have no weight against an uniform contrary usage; *Arndell v. Lord Falmouth*, 2 M. & S. 440. Where the plaintiff claimed a right in the soil of land adjoining his farm, it being contended that he had only a commonable right, held that an ancient instrument in the nature of a presentment at the manor court by the freeholders, finding that the then owner of the farm, and those claiming the right of the soil, had no separate right, but only a right thereon, as the other freeholders, for commonable cattle, was inadmissible in evidence, either as a presentment, the homage having no right to decide upon a claim made by an individual to the freehold, or as an award, the party not appearing to have submitted himself, or as evidence of reputation, being *post litem motam*; and, *semble*, reputation could not affect a question of private right; *Richards v. Bassett*, 10 B. & C. 657; E. C. L. R. 21.

^m *Vide* Vol. II., tit. CUSTOM.

ⁿ See Lord Kenyon's observations, *Roe v. Parker*, 5 T. R. 26; 2 M. & S. 92;

dence to prove the mode of descent, although no instances of persons having taken according to that mode be proved ;^o so they are to prove that proclamations have been made.^p A customary of a manor, which has been handed down from steward to steward with the court rolls, is evidence of the mode of descent within the manor, although not signed by any one.^q

*454] ^oCourt rolls, containing a presentment of admittance upon surrender out of court, are primary evidence between surrenderor and surrenderee to prove the surrender ; and consequently the original surrender need not be produced.^r

The examined copy of a court roll^s is admissible in evidence, upon the same principle as the chirograph of a fine or enrolment of a deed.^t So a copy of a court roll under the hand of the steward is good evidence to prove the copyholder's estate.^u An examined copy of a particular entry in the court rolls of a manor is evidence without producing the original, even where it may be presumed that the books themselves contain other entries connected with the point in issue.^x A surrender of copyhold lands ^yby deed out of
*455] court is evidenced by the copy, although the stat. 48 Geo. III.

and *Chapman v. Cowlan*, 13 East, 10 ; *Doe v. Mason*, 3 Wils. 63 ; *Lord Carnarvon v. Villebois*, 13 M. & W. 313.

^o 5 T. R. 26 ; 2 M. & S. 92.

^p *Doe v. Hellier*, 3 T. R. 162.

^q *Denn v. Spray*, 1 T. R. 466 : see tit. COPYHOLD. So to support proof of a custom for a lord of a manor to take only one heriot on the death of a tenant, whatever the number of holdings he might have, a paper purporting to be a copy of an old decree of the Court of Chancery in a suit between a copyholder and the lord, produced by a witness who succeeded his brother as lord of the manor, and who stated he had found it amongst his brother's papers, was held to be admissible in evidence as against a subsequent lord, after evidence of an ineffectual search for the original ; *Price v. Woodhouse*, 3 Ex. 616.

^r *Doe dem. Garrod v. Olley*, 12 A. & E. 481 ; E. C. L. R. 40.

^s *Doe d. Bennington v. Hall*, 16 East, 208 ; 5 Esp. C. 221 ; Comb. 157 ; *R. v. Haines*, *ib.* 337. The originals are evidence, although unstamped ; 16 East, 208 ; 4 B. & Ad. 617 ; E. C. L. R. 24 ; B. N. P. 247 ; so is an examined copy, the copy referred to by the Stamp Act being that which is delivered by the steward to the tenant ; *Doe v. Freeman*, 12 M. & W. 844.

^t *Per Holroyd, J.*, in *Appleton v. Lord Braybrooke*, 6 M. & S. 38.

^u B. N. P. 247 ; 16 East, 208.

^x *Doe d. Churchwardens of Croydon v. Cook*, 5 Esp. C. 221 ; and see *Style*, 450 ; *R. v. Shelley*, 3 T. R. 141 ; *R. v. Allgood*, 7 T. R. 746 ; *R. v. Lucas*, 10 East, 235 ; *Bateman v. Phillips*, 4 Taunt. 162. Court rolls, containing licences to fish, granted in the 17th century at certain rents, are admissible to prove a prescriptive right to a several fishery, claimed as appurtenant to a manor, without showing the actual payment of those rents, where it appears that during the last

c. 149, requires the deed and not the copy to be stamped.⁷ See further on this subject, Vol. II. tit. COPYHOLDS.

The books of a corporation,⁸ containing a register of their public acts, are evidence as between the members of the body, or against the body, for they contain the rules and regulations to which they are all subject, and to which all are privy.⁹ But they are not evidence for the corporation against a stranger.¹¹

In the case of *Marriage v. Lawrence*,⁶ where in an action for trespass century leases have been granted of the fishery, and that for the last forty years the rents under the leases have been regularly paid, or that other acts of ownership have been acquiesced in; *Rogers and others v. Allen*, 1 Camp. C. 109. As to the right of inspecting Court rolls, see Vol. II. tit. INSPECTION. The right to inspect does not depend on the pendency of a suit; *R. v. Lucas*, 10 East, 235; but see *R. v. Allgood*, 7 T. R. 746, *contra*. An inspection will be granted on a *prima facie* title; 10 East, 235, as to ascertain a right (to cut timber, *e. g.*) which the lord disputes; *R. v. Tower*, 4 M. & S. 162. Where a lord of a manor is indicted for a nuisance in not repairing the bank of a river, the Court will not compel him to allow the prosecutor, even though he is a tenant of the manor, to inspect the court rolls for the purpose of obtaining evidence in support of the prosecution; *R. v. Earl of Cadogan*, 5 B. & Ald. 902; E. C. L. R. 7.

⁷ *Doe v. Mee*, 2 B. & Ad. 617; E. C. L. R. 24; and see *Doe v. Freeman*, *supra*, note (s).

⁸ For further details of the evidence respecting corporations and companies, see Vol. II. tit. CORPORATIONS.

⁹ See the case of *Thetford*, 12 Vin. Abr. 90, pl. 16; and *R. v. Mothersell*, Str. 93.

¹⁰ *Mayor of London v. Lynn*, 1 H. Bl. 214, n.; *The Mayor of Kingston-upon-Hull v. Horner*, Cowp. 102. Entries in corporation books in order to show that the curate had been appointed by the corporation, were held inadmissible as evidence to establish their right against the vicar; *Attorney-General v. Warwick Corp.*, 4 Russ. 222.

¹¹ 3 B. & Ald. 142; see *The Mayor of Kingston-upon-Hull v. Horner*, Cowp. 103, where, in an action by the corporation for tolls, entries from the corporation books of the particulars of the tolls receivable to the use of the mayor, &c., were read. Copies of an ancient schedule produced from the muniments of the corporation, delivered to the toll-collectors, and by which they collected, were held admissible for the corporation, although it would have been otherwise if not shown to have been so delivered from the corporation, however accurately corresponding; *Brett v. Beales*, Mood. & M. 417; E. C. L. R. 22.

¹ The books of a corporation, when proved to be such, are evidence of its acts and proceedings; *Owings v. Speed*, 5 Wheat. 420; *Highland Turnpike Co. v. McKean*, 10 Johns. 154. They are evidence in disputes between its members, but not against strangers; *Commonwealth v. Woelper et al.*, 3 Serg. & Rawle, 29. Entries made by a clerk, in the books of trustees who are a corporation, are not evidence in a cause in which they are interested; *Jackson v. Walch*, 3 Johns. 226; see *Farmers' and Mechanics' Bank v. Boraef*, 1 Rawle, 152. M.

pass the issue was upon the right of the corporation of Malden to take certain tolls, it was held that an entry from the books of the corporation, dated 18 Hen. VIII., purporting to contain the proceedings of the corporation against the masters of two ships who *456] had refused* to pay tolls, the seizure of the ships, and the submission of the masters to the payment of a fine, and to have been signed by the corporation clerk, was inadmissible, because the entry was not of a public nature. But it was said that, if the subject of the entry had been of a public nature, the case would have been different.

A customary, found in a book amongst the records of a corporation, was held to be evidence against the corporation. But in general, unless papers relate to the proceedings of the corporation as a corporate body, they are not evidence; and, therefore, a letter found in a corporation chest, in which *A. B.* was described to be of another place, was held to be inadmissible on a question whether *A. B.*, at the time he did a corporate act, was an out-burgess or not.^d

Upon the same principle, the books of public companies,^e or copies of them, are evidence between those who are interested in them, as against each other, or against the company; as the books of the East India Company, in a cause between the parties having stock there.^f So the bank books,^g or copies^h from them, are evidence to prove a transfer of stock in the public funds.ⁱ

To establish the book of a corporation in evidence, it should be shown to have been publicly kept as such, and that the entries *457] were made by the proper officer. But *an entry made by one who acts for the officer *pro tempore*, as during the illness

^d *R. v. Gwyn*, Str. 401.

^e *Geary v. Hoskins*, 7 Mod. 129; see 2 Str. 1005; 1 Wils. 240; 1 Bl. R. 40; 1 T. R. 689; Doug. 593; 3 Salk. 154.

^f *Breton v. Cope*, Peake's C. 30. ^g *Mortimer v. MacCallan*, 6 M. & W. 68.

^h *R. v. Mothersell*, Str. 92; 12 Vin. Abr. 90, pl. 16. The usual mode of procuring an inspection of corporation books is by rule, where an action is pending; by *mandamus* in other cases. A rule can only be granted where a cause is pending, and only then for a *limited* inspection. For an unlimited inspection, the course is by *mandamus*; *R. v. Babb*, 3 T. R. 579; *Lynn Corporation v. Denton*, 1 T. R. 689; *Barnstaple Corporation v. Lathey*, 3 T. R. 303; see, further on the subject, Vol. II. tit. INSPECTION.

ⁱ See 7 & 8 Vict. c. 110, for the regulations affecting private joint-stock companies and their books, and "The Companies Clauses Consolidation Act, 1845" (8 & 9 Vict. c. 16), for the regulations affecting companies for the execution of works of a public nature, for which Acts of Parliament are obtained.

of the town clerk, is evidence, if the fact be proved.* On this ground, upon a *quo warranto*, it was held that minutes of the proceedings of a corporation, taken several years before by the prosecutor's clerk, and not kept as a public book, had been properly rejected at the trial.¹¹

The seal of a public corporate body need not be proved, as the seal of an individual, by means of a witness who saw the seal affixed, &c., to the instrument; it is sufficient to show that the seal is the official seal of the corporate body.^m As public seals are of a permanent nature, it seems that they are not within the principle of the rule which dispenses with the proof of private seals affixed to documents thirty years old.ⁿ The documents must be proved

* *R. v. Mothersell*, Str. 92; 12 Vin. Abr. 90, pl. 16.

¹ Str. 92; 12 Vin. Abr. 90, pl. 16.

^m *Moises v. Thornton*, 8 T. R. 307; *Chadwick v. Bunting*, Ry. & M. 306; E. C. L. R. 21. It has been held that the seal of the city of London proves itself, by Lord Kenyon; *Woodmass v. Mason*, 1 Esp. C. 53. The production of a sealed instrument purporting to be a diploma of a decree conferred by the University of St. Andrew's, and proof that a person calling himself the university librarian, had shown in a room which he called the University Library a seal corresponding with the instrument produced, was held to be sufficient evidence; *Collins v. Carnegie*, 1 Ad. & E. 695; E. C. L. R. 28.

ⁿ *R. v. Bathwick*, 2 B. & Ad. 648; E. C. L. R. 22. Where it was also held that the seal of a bishop to an ordination was not to be regarded as his corporate seal. But it is to be observed that a corporation may from time to time alter its seal.

¹ Before corporation books can be admitted in evidence, it must be shown that they are kept by the proper officer or some other person authorized to make entries in his necessary absence: It is not sufficient to prove the books to be in the handwriting of a person stated in the book itself to be the Secretary, if he is not otherwise shown to be the proper officer; *Highland Turnpike Co. v. McKean*, 10 Johns. 154. A copy of an entry in a corporation book is not authenticated by the seal of the corporation; an examined copy must be produced; *Stoever v. Lessee of Whitman*, 6 Binney, 416. The original corporation book is good evidence in a suit by the corporation against one of its members, although it is not under the corporate seal; *Fleming et al. v. Wallace*, 2 Yeates, 120.

The seal of a private corporation does not authenticate itself; it must be proved by testimony; *Dea v. Vreelandt*, 2 Halsted's Rep. 352; *Leasure v. Hillegas*, 7 Serg. & Rawle, 313; *Foster v. Shaw*, Ibid. 156; *Jackson v. Pratt*, 10 Johns, 381.

A secretary of an incorporated banking company, is not, in Massachusetts, a certifying officer; a copy, therefore, of the votes and proceedings of such corporation, certified by him, is not evidence, unless it is sworn to. But *semble* that an extra-judicial affidavit is sufficient to authenticate such copy; *Hallowell & Augusta Bank v. Hamlin et al.*, 14 Mass. Rep. 178; see *Rust v. Boston Mill Corporation*, 6 Pick. Rep. 158.

to have come from the proper place of deposit. But in an action for a false return to a *mandamus*,^o it was held that a corporator was capable, as a depository of the muniments, of being brought forward for the purpose of producing them, subject to cross-examination by the *adversary, as to the custody of the document.^p And if the party objecting wished to inquire as to the custody, the corporator might be examined on the subject.^q

By the Municipal Corporation Act, 5 & 6 Will. IV., c. 76, every person is entitled, without fee, to inspect the freemen's roll at all reasonable times, and the lists of persons claiming to be inserted on the burgess list, or objected to, at all reasonable hours, Sunday excepted, during the eight days next before the 1st of October; and the town clerk is moreover bound, at a certain price, to furnish copies of these documents.^r The public accounts of the borough are open to the inspection of the aldermen and councillors before audit; and after they have been audited and made up every year, every ratepayer is at liberty to inspect the abstract of their contents, which the town clerk must make;^s and every burgess is entitled at all reasonable times to inspect and take copies of the book in which minutes of the town council are entered, and any order in council for payment of any money.^t

IV.—*Private Documents.*

Private writings and entries may, with a view to their operation in evidence, be distinguished into those: *First.* To which the person against whom they are offered was party or privy. *Secondly.* Entries made by third persons. And they may be considered, first, with respect to their nature, admissibility and effect in evidence; and, secondly, with respect to the means of proof. Documents offered in evidence against one who was a party or privy to them, are either under seal or not under seal. All documents *which a person was party^u or privy are in general admissi-

^o *R. v. Netherthong*, 2 M. & S. 337.

^p As to the means of procuring an inspection of such documents, see tit. INSPECTION.

^q *Per* Lord Ellenborough, *R. v. Netherthong*, 2 M. & S. 337, citing a case in which Lord Kenyon had so acted in an action for a false return of a *mandamus*.

^r Sect. 5 & 17; a penalty of 50*l.* is imposed for refusal, by s. 48.

^s Sect. 93; and 1 Vict. c. 78.

^t Sect. 69; and 1 Vict. c. 78.

^u *Lord Barrymore, Administrator, v. Taylor*, 1 Esp. C. 326, Kenyon, C. J., 1795; and see *Smith v. Young*, 1 Camp. 439; *Randle v. Blackburn*, 5 Taunt. 245; E. C. L. R. 1.

ble in evidence against him, since they operate as acknowledgments or admissions on his part, or that of another through whom he claims, that the facts contained in them are true, particularly if the admission was against the interest of the party so making it.^a Thus, upon a question touching the right of presentation by the bishop, a case stated by a former bishop for counsel's opinion, and found among the family muniments of the latter's descendants, is admissible in evidence against the former. All written contracts are made for the express purpose of being afterwards used as evidence of the contract, the only difference between sealed and parol contracts in this respect being this—that the former are more solemnly authenticated, and not so easily revoked. So essential is it that the rights of men should be evidenced by documents of this nature, that the law itself requires, in many instances, the evidence of a deed to notify and establish the particular facts, and in many others renders a contract, or memorandum in writing, essential for the same purpose. Thus incorporeal rights, as to fairs, markets, and advowsons, cannot be transferred except by grant,⁷ and the provisions of the Statute of Frauds in many instances render a note or memorandum in writing necessary to the proof of the contract.²

In general, an admission under seal is conclusive upon the obligor, and estops him from asserting or proving the contrary. Thus, if a condition in a bond recite that a particular suit is depending in the Court of King's Bench, the obligor is estopped from saying that there is no such suit *there.^a So if the condition of a bond be to perform the covenants in a par- [*460 ticular indenture, he is estopped from saying that there is no such indenture.^b So a grantor is estopped by his deed from saying that he had no interest in the thing granted.^c But although where a

^a *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 193; E. C. L. R. 32; see Vol. II. tit. ADMISSIONS.

⁷ See Gilb. Law of Ev. 88; Vol. II. tit. PRESCRIPTION. And now leases for more than three years, and certain other instruments, see 8 & 9 Vict. c. 106.

² 29 Car. II. c. 3.

^a Cro. Eliz. 750; Com. Dig. Estoppel, A. 2; 5 Ex. 557.

^b 1 Rol. 872, l. 30; Com. Dig. Estoppel, A. 2. For other instances, see tit. ADMISSIONS.

^c 2 T. R. 171. But the principle does not apply where the grantor is a trustee for the public, and grants that which he was not authorized by the Act from which he derives his authority; *Ibid.* But this is confined strictly to the case in which he has violated an Act of Parliament, which must be presumed to have

distinct statement of a particular fact is made in the recital in a bond or other instrument under seal, and a contract is made with reference thereto, it is not competent to the parties bound by that deed to deny the recital in an action upon it between them; and although the same rule may apply where the instrument is not under seal; yet in an action not founded on the instrument, but wholly collateral to it, the parties are not so bound, even in an *461] action *between themselves, but may show the circumstances under which the admission was made, in order to prove that it is not entitled to weight.^d A deed-poll does not estop a lessee or grantee, for it is the deed of the lessor or grantor only.^e

In general, however, in order to conclude the party by his deed by way of estoppel, it should be pleaded, for if his adversary does not rely upon the estoppel, the court and jury are not bound by it; but the jury may find the matter at large according to the fact, and the court will give judgment accordingly. He asks them their opinion, and they are bound to give it. Where, however, the title of the party is by estoppel, and he has no opportunity of pleading it, the jury cannot find against the estoppel. Thus in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot

been known to the other party. Thus public trustees may be estopped by a recital from alleging against their mortgagee of tolls that they had granted a prior mortgage of them; *Doe v. Horne*, 3 Q. B. 757; E. C. L. R. 43; *R. v. White*, 4 Q. B. 111; E. C. L. R. 45. If, however, it appear from any part of the recital or deed that the grantor has no estate, or only a limited or equitable one, he will not be estopped; *Pargeler v. Harris*, 7 Q. B. 708; E. C. L. R. 53. In order also to raise an estoppel a recital should not be argumentative, but direct and precise on the point; thus where an agreement for a lease of a farm recited that the defendant had, as he was advised, legally put an end to a former lease granted to *S. H.* a bankrupt, by entering, under a power so to do, on the tenant's bankruptcy; and it was agreed that the defendant should grant a lease to the plaintiff of the farm at a yearly rent, the lease to commence on a day mentioned, if the defendant could then legally execute the same, or as soon as he legally could; the rent to commence with the term, or on possession being given, whichever should first happen; it was held, that although the recital might be *prima facie* evidence against the defendant, that he had power to grant the lease, that evidence was answered by proof that the bankruptcy of *S. H.* had been superseded; *Wright v. Colls*, 19 L. J., C. P. 60.

^d *Carpenter v. Buller*, 8 M. & W. 209; *Wiles v. Woodward*, 5 Ex. 557.

^e Co. Litt. 363, b. A lessee by indenture, in an action of covenant for ploughing up Laines Meadows, without paying at a certain sum per acre, was held not to be estopped from averring that Laines Meadows were not meadow ground, although they were described as meadows in the lease; *Skipwith v. Green*, Str. 610.

give in evidence that the plaintiff had nothing in the tenements, because if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him; but if the defendant plead *nihil habuit*, &c., and the plaintiff, instead of relying on the estoppel, reply *habuit*, &c., he waives the estoppel, and leaves the matter at large; he puts the fact in issue; and the jury are to find the truth, notwithstanding the indenture.^f

But when an estoppel creates an interest in lands, the court will adjudge accordingly upon the facts found by the jury. As if *A.* lease land, in which he has no interest, to *B.* for six years, and then purchase a lease of the same *lands for twenty-one [*462 years, and afterwards lease to *C.* for ten years, and these facts are found by verdict, the court will adjudge the lease in *B.* to be good, though it was so only by the conclusion.^g

So in other cases, where the party who might have relied upon the estoppel, in pleading, waives it, and gives the deed in evidence, although the jury are not bound by the estoppel from finding according to the truth of the fact, yet it seems they would not be warranted in finding a verdict contrary to the solemn admission of the party, without the strongest evidence of fraud. As, for instance, before the rules of Hilary Term, 1834, in an action of *assumpsit*, where the defendant pleaded the general issue, and gave in evidence a release which he might have relied upon as an estoppel; although he waived the estoppel, still the release was considered to be conclusive evidence for the defendant, in the absence of fraud. There are also numerous instances in which a party, by his admissions and representations, is concluded from showing the contrary in evidence, although the fact could not have been pleaded by way of estoppel.^h For instance, where a man has represented a woman to be his wife, in an action for necessaries supplied to her, he would in general be

^f P. C. Salkeld, 277; Com. Dig. Estoppel, C.; *ibid.* Pleader, S. 5; B. N. P. 298. See the notes to *Trevivan v. Lawrence*, Salk. 276; 2 Smith's Lead. Cas. 436.

^g Com. Dig. Estoppel, E. 10; see also Pollex. 68. So if the plaintiff in ejectment make title by a judgment, in a *scire facias*, on a judgment in Trinity Term, where the judgment was in fact of Michaelmas Term, the jury cannot find that the original judgment was of Michaelmas Term; *Trevivan v. Lawrence*, Salk. 276. So if a woman sue or be sued as sole, and judgment be against her as such, though she was covert, the sheriff shall take advantage of the estoppel; 1 Rol. 869, l. 50; 1 Salk. 310; Com. Dig. Estoppel, B. D.

^h *Freeman v. Cook*, 2 Ex. 654; 13 M. & W. 820. See Vol. II. tit. ADMISSION.

concluded by that representation, which would operate as a kind of estoppel *in pais*.

It is a general rule that all privies, whether in blood as the heir,¹ *463] in estate as the vendee,^k or in law as the *lord by escheat,¹ or one who claims under another by act of law, or in the post,^m tenant in dower, or by the courtesy,ⁿ are bound by an estoppel.

The effect of deeds and written contracts, not under seal, will be hereafter more fully considered under the several heads to which they belong, as bonds, covenants, agreements, bills of exchange, policies of insurance, &c. It may be observed here, that since in all these cases these documents have been framed by the parties themselves as the authentic evidence of the facts which they contain, and of their own intentions, no other evidence can in general be admitted to alter the obvious sense and meaning of the terms which they have used; to admit this would be to deprive them of all effect as permanent memorials for the purposes of evidence, for they could no longer be so considered if their meaning could be altered and subverted by extrinsic and collateral evidence. Since this is a fundamental rule, applicable to written evidence in general, its nature and application will be more fully discussed hereafter.^o

Secondly, Declarations and entries made by third persons (for both stand upon the same footing) are not in ordinary cases admissible; they usually fall within the description of *res inter alios acta*.^p

Whether the declaration by a third person be oral or written, the general objection applies, that it was not made under the sanction of an oath, and that the party against whom it is offered had no opportunity to cross-examine. Such a declaration or entry is therefore, on principles already adverted to, inadmissible, unless its admissibility be warranted by some special rule of law applicable to the particular circumstances.^q

¹ Co. Litt. 352. a.; Pol. 61, 66; Com. Dig. Estoppel, B.; 3 T. R. 365.

^k 1 Salk. 276.

¹ Co. Litt. 352. a.

^m Co. Litt. 352, b.

ⁿ Pol. 61; Co. Litt. 352.

^o See tit. PAROL EVIDENCE.

^p See above, tit. RES INTER ALIOS, &c. As to those which operate by way of admission, see Vol. II. tit. ADMISSION.

^q In trover for taking goods by defendant under colour of distress, the question being whether the defendant or *J. B.* was the plaintiff's landlord, the latter having been shown by the plaintiff to have been the party to whom he and his father had always paid the rent; held, that the defendant, in order to show that he received it merely as agent, could not give in evidence accounts rendered by that

*The entry or declaration of a mere third person may be admissible as evidence, first where it *accompanies* and is *explanatory* of the nature and quality of a material fact, or secondly, where it is admitted on a principle of necessity, warranted by particular circumstances, which afford a reasonable assurance that the party whose testimony is no longer attainable *knew* the fact, and *communicated* it faithfully. [*464]

The considerations which warrant the reception of this latter class of evidence are principally these:—

*That the declaration or entry was against^r the pecuniary or proprietary^s interest of the party to make it; or that the entry was made at the time, in the ordinary course of his business, by a person whose duty it was to make it;^t and that recourse cannot be had to his testimony in consequence of his death. [*465]

Considerable doubt seems to have existed at one time whether an party in which he described himself as agent, as the party being alive might have been called, and that they were therefore properly rejected; *Spargo v. Brown*, 9 B. & C. 935; E. C. L. R. 17. In assumpsit for two-fifths of a loss recovered by the defendants as agents for *S.*, an invoice sent by *S.* to the defendants, to enable them to recover from the underwriters, was held to be evidence of the plaintiff's interest; *Mendham and another v. Thompson and another*, 1 Stark. 316, Ellenborough, C. J., 1816. But an invoice made out by *S.*, and not shown to have been so sent, was rejected as merely *S.*'s declaration. In an action against underwriters, the bill of lading, signed by the captain, is not evidence of the shipment of the goods; *Dickson v. Lodge*, 1 Stark. C. 226; E. C. L. R. 2. A banker's ledger is admissible to show that a customer had no funds in the banker's hands; *Furness v. Cope*, 5 Bing. 114; E. C. L. R. 15. *Semble*, more properly to show that no entry was made in that ledger.—Note, that one of the clerk's stated that it was the book to which all the clerks referred to see whether they should pay the checks presented to the house; and Best, C. J., held that it was admissible in order to obviate the necessity for calling a multitude of clerks, and that it was evidence merely to negative the fact of the trader having money in the house.

In an action on a warranty of a horse sold by an agent, it was proposed to ask a witness whether the agent did not say on the day of the sale that he would warrant the horse, but the evidence was rejected as a mere conversation with a stranger; but it might have been otherwise if in offering the horse for sale he had offered the warranty; *Allen v. Denstone*, 8 C. & P. 760; E. C. L. R. 34.

^r See the cases on this subject fully stated and discussed in the notes to *Higham v. Ridgway*, 2 Smith's Lead. Cases, 183, and the reasons for the reception of such evidence considered, *ante*, pp. 64, 65. As to declarations in cases of marriage and pedigree, see those heads, also tit. REPUTATION.

^s *Sussex Peerage case*, 11 Cl. & F. 85.

^t See the cases on this subject discussed in the notes to *Price v. Lord Torrington*, 1 Smith's Lead. Ca. 139.

entry so made in the ordinary course of business was admissible unless" it appeared also to be against the interest of the party making it; but it seems now to be clear that the circumstance of its being made in such course, if the party who made it be dead, is sufficient to warrant the admission of the evidence.

Indeed it may be observed, that the consideration that the entry was made in the course of discharging a professional or official duty, in which the party was engaged, seems to afford a much safer warrant for giving credit to such evidence than is supplied by the consideration that the entry or declaration might possibly have been used to the prejudice of the party.

It is observable, that the great object of the rule is, to guard not against *fraud*, but negligence and carelessness: the slightest suspicion of fraud would be sufficient at once to exclude such evidence and the imposing of the limitation, that the entry, to be admissible, should be apparently against the interest of the party making it, would afford no security against fraud; the forger of a false entry *466] would *take care to obviate any objection of this description, by admitting payment or some other fact apparently against the interest of the supposed author of the document. The consideration that the entry is against the interest of the party is therefore principally material, as it affords reason for supposing that a person would not be likely to commit any error or mistake which might afterwards turn to his prejudice. When, however, it is considered that in many instances such entries remain in the private custody of the parties who make them, it is not probable that the consideration that the document might be published by accident or mistake, and might in some possible state of circumstances, be turned to the prejudice of the party, would cause him to exercise a degree of exactness and caution, so far beyond that which he would have used in the common course of professional or official duty, or ordinary habits of business, as to supply a sound and useful test, operating to the admission of the former, the rejection of the latter. In the absence of all suspicion of any motive to the contrary, it is fairly presumable that all entries made in the ordinary routine of business are truly made. The same motive which induced a party to use the pains and trouble of making an entry at all, would usually induce him to make a true entry; a false one would be of

* See the observations of the Judges in *Doe v. Turford*, 3 B. & Ad. 890; E. C. L. R. 23; *Doe v. Robson*, 15 East, 32; *Higham v. Ridgway*, 10 East, 109; per Lord Eldon, *Barker v. Ray*, 2 Russ. 67.

no value, and the making it would frequently be more troublesome than to make a true one; it would require the additional trouble of invention; and although the sparing of trouble might, in many instances, induce a party to state particulars without sufficient accuracy, it would seldom cause him to invent and state a transaction which never happened.

In the first place, an entry or declaration accompanying an act seems, on principles already announced, to be admissible evidence in all cases where a question arises as to the nature and quality of that act. Thus where the question is, whether a promissory note was originally void for usury, letters written by the payee to the maker, and *which are contemporary with the note, are [*467 admissible to prove that the consideration was usurious.*

Such evidence is also admissible on the same principle, to show the *intention* with which an act was done, where the intention is material.⁷ Thus, on questions of bankruptcy, declarations made by a trader, contemporary with, or during the act of absenting himself from his place of residence or business, are constantly admitted in proof of the real nature and quality of the act.¹¹

* *Kent v. Lowen*, 1 Camp. 177; *Walsh v. Stockdale*, vol. 2. A letter inclosing a promissory note may be read as evidence, by the writer, to show the purpose for which the note was sent; *Bruce and others, v. Hurley*, 1 Stark. C. 23; E. C. L. R. 2. And see *Potez v. Glossop*, 2 Ex. 191; *Lewis v. Simpson*, *ibid.* note. The principle of these cases is that the declarations or entries in fact form part of the *res gestæ*. See 1 Q. B. 50; E. C. L. R. 41; and *post*, Vol. II.

⁷ *Supra*, p. 51, 52; Vol. II. tit. INTENTION—MALICE. In *The Attorney-General v. Brazen Nose College*, 2 Cl. & F. 295, the House of Lords decided that the manner in which the founder of a school, who was the first trustee under the grant by which it was provided for, conducted himself in the distribution of the fund, is very strong evidence of intention, and may be so treated by the Court in construing the grant.

* *Rouch v. Great Western Railway Company*, 1 Q. B. 50; E. C. L. R. 41; *Supra*, pp. 51, 87, 88, 89; Vol. II. tit. BANKRUPTCY. When an act has been done to which it is necessary to ascribe a motive, what the person has said at the time is admissible, for the purpose of explaining the act; *Bateman v. Bailey*, 5 T. R. 512. Statements made by the bankrupt showing his knowledge and opinion of

¹ It is difficult to lay down any precise rule as to the cases in which declarations are admissible as part of the *res gestæ*; *Allen v. Duncan*, 11 Pick. 309. They must have been made at the time of the act done which they are supposed to characterise; *Enos v. Tuttle*, 3 Conn. 250; *Pool v. Bridges*, 4 Pick. 378; *Reigart v. Ellmaker*, 10 S. & R. 27; *Selin v. Snyder*, 11 S. & R. 319; *Deardorf v. Hildebrand*, 2 Rawle, 226; *Evans v. Jones*, 8 Yerg. 461; *Posterns v. Posterns*, 3 Watts & Serg. 127. Declarations of a person in possession of personal property with respect to it are admissible as part of the *res gestæ*; *Oden v. Stubblefield*, 4

*468] *Indeed, wherever an entry or declaration reflects light upon, or qualifies, an act which is relevant to the matter in

the state of his affairs at the time of the acts in question, have been held to be receivable, although not accompanying any other act done. So letters received by him in answer to applications for advances are evidence to show the refusal to render him such assistance, but not as to any facts stated in them; *Vacher v. Cocks*, Mood. & M. 353; E. C. L. R. 22. A trader in embarrassed circumstances made an assignment of all her effects, &c., for the benefit of creditors: in an action after her death, treating the assignee as executor *de son tort*, a list of creditors made out by a friend of the trader under her direction, about the time of the execution of the assignment, was held to be evidence to show that the assignment was *bona fide*; *Lewis v. Rogers*, 4 C. M. & R. 48. So declarations by a person in a state of insolvency, tending to show that he knew it, are admissible to prove such knowledge, provided the fact of insolvency be proved otherwise; *Thomas v. Connell*, 4 M. & W. 267.

Alabama, 40; *Parker v. Marston*, 34 Maine, 386; *Darling v. Bryant*, 17 Alabama, 10; *Brazier v. Burt*, 18 Ibid. 201; *Perry v. Graham*, 18 Ibid. 822. So in an action against an individual for enticing away the servant of another, evidence of the declarations of the servant, at the time he left, as to the motives which influenced him, are admissible on the same principle; *Hadley v. Carter*, 8 N. Hamp. 40. If the declaration of a person is in itself a fact in a transaction, or is made by him while doing an act and serves to explain it, it is to be received in evidence as part of the *res gestæ*; but a recital of past transactions is not admissible, although it may have some relation to the act which the person may be doing when he makes such declaration; *Haynes v. Rutter*, 24 Pick. 242; *Bank v. Clark*, 2 Vermont, 308. *Res gestæ* are the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it and serve to illustrate its character; *Carter v. Buchannon*, 3 Kelley, 513; *Smith v. Webb*, 1 Barbour, 230; *Holbrook v. Murray*, 20 Verm. 525; *Plumer v. French*, 2 Foster, 450; *Dawson v. Hall*, 2 Mich. 390. Where the plaintiff relies upon proof that the defendant requested an enrolment of a vessel to be made in a certain way, without declaring at the time the purpose for which it was to be so enrolled, the declarations of the defendant as to the purpose, made preliminary to his request, and an hour or two previous, are competent testimony in his behalf, as part of the *res gestæ*; *Smith v. Smith*, 1 Sandf. Sup. Ct. R. 206; *Mitcheson v. The State*, 11 Georgia, 615. The declarations of third persons are not admissible in evidence as part of the *res gestæ*, unless they in some way elucidate or tend to give a character to the act which they accompany or may derive a degree of credit from the fact itself. If they can have no effect upon the act done, and derive no credit from it, but depend for their effect entirely upon the credit of the party who makes them, they are not admissible merely because they may have some connection with the act or relate to it; *Wood v. Banks*, 14 N. Hamp. 101; *Tomkies v. Reynolds*, 17 Alabama, 109; *Thomas v. Degraffenreid*, 17 Ibid. 602; *Robertson v. Smith*, 18 Ibid. 220; *Lund v. Tyngsborough*, 9 Cushing, 36. The term *res gestæ* can be properly applicable only to transactions with which the parties were connected while the negotiation between them was unfinished; *Wilson v. Sherlock*, 36 Maine, 295; *Battles v. Batchilder*, 39 Ibid. 19. Where a bargain between one of

issue and is evidence in itself,^a it becomes admissible as part of the *res gestæ*, if it be contemporaneous with the act, or so connected with it as to render it part of one continuous transaction.^b

In the case of *Aveson v. Lord Kinnaird*,^c on an insurance effected on the life of the wife, the question was, whether she was in an insurable state at the time; and declarations by her, made a few

^a *R. v. Bliss*, 7 Ad. & E. 550; E. C. L. R. 34. Thus in *Wright v. Tatham*, 5 Cl. & F. 670, on a question as to the competency of a party to make a will, letters written to him by others, and found many years after their date amongst his papers were held inadmissible without proof that he himself acted upon them; because the fact of writing the letters was not a material or relevant fact, and there was none other which they qualified or explained, *S. C.* 7 Ad. & E. 313; E. C. L. R. 34.

^b Thus, where the plaintiff had received in the lifetime of the owner certain notes as an alleged gift, and after the death of the party, the defendant having inquired as to what property of the deceased the plaintiff possessed, she voluntarily produced the notes, stating at the time how she had received them, and the defendant had refused to deliver them back; held that her account, as part of the *res gestæ*, was admissible to go to the jury as to the way she became possessed, which, with other circumstances, might induce the jury to believe it correct or not; *Hayship v. Gymer*, 1 Ad. & E. 162; E. C. L. R. 28; and 3 N. & M. 479; E. C. L. R. 28. The declaration of the defendant's wife in delivering money to a witness to be paid over to the plaintiff in payment for sheep, is evidence in an action for the price; *Walters v. Lewis*, 7 Car. & P. 344; E. C. L. R. 32; and see *R. v. Hall*, 8 Car. & P. 358; E. C. L. R. 34. That the declaration or entry need not be contemporaneous, if there be such connecting circumstances as to render it part of the *res gestæ*; see *Rawson v. Haigh*, 2 Bing. 104; E. C. L. R. 9; *Ridley v. Gyde*, 9 Bing. 349; E. C. L. R. 23; *Rouch v. Great Western Railway Company*, 1 Q. B. 50; E. C. L. R. 41.

^c 6 East, 188; and *R. v. Johnson*, 2 Car. & K. 354; E. C. L. R. 61; *R. v. Guttridge*, 9 Car. & P. 472; E. C. L. R. 38; *per Parke, B.*; and see *Gardner Peerage case*.

the parties to a suit and a third person, becomes a material fact, what was said by those persons relative to the bargain at the time of making it, is admissible as a part of the *res gestæ*; *Johnson v. Elliott*, 6 Foster, 67. The conduct and exclamations of passengers on a railroad at the time of an accident, though not in the presence of the party receiving an injury may be given in evidence as a part of the *res gestæ*; *Railroad Co. v. Fay*, 16 Illinois, 558. Declarations in regard to the ownership of property by the party delivering the same to a carrier, at the time of delivery, are admissible as part of the *res gestæ*. So also are concurrent acts and declarations of a mandatary in explanation of the loss of the property after and about the time of the alleged loss; *McNabb v. Lockhart*, 18 Georgia, 495. But declarations are not admissible as part of the *res gestæ*, unless the acts which they accompany are themselves relevant and material, independently of what was said; nor unless the declaration relates to those acts and is explanatory of them; *Morrill v. Foster*, 32 N. Hamp. 358,

days after the certificate of her health had been obtained, as to the state of her health at the time when the certificate was obtained, *469] and down to the time of the conversation, were *held to be admissible in evidence, with a view to show her own opinion as to the state of her health, as well as with a view to contradict the evidence of the surgeon who, having been called as a witness for the plaintiff, had stated that he considered her to be in good health, but that he had formed this opinion from the answers she had given to his inquiries. In an action of trespass, what the wife said immediately on receiving the injury, and before she had time to devise any thing for her own advantage, is also evidence.^a So is the complaint made by a person in case of rape, or an attempt to commit a rape, immediately after the injury.^b

To this head also the admissibility of declarations by tenants has sometimes been referred, and it seems that such declarations are clearly referable to this principle in all cases where the nature and quality of an act of ownership or dominion, or of the possession, is questioned and requires explanation, or when the nature and quality of the possession are questioned, and the contemporary declaration of the party doing the act, or of the party in possession serves to elucidate and explain the nature and quality of such act or possession.

*470] The application of the general principle already *announced stands thus: In the absence of direct documentary proof of the title to lands, or to an easement or right arising out of lands, acts of possession and enjoyment must be resorted to as indirect evidence of the right.^c Where such possession and

^a *Thompson and his Wife v. Trevanion*, Skin. 402. So upon an indictment for manslaughter, a statement by the deceased as to how the accident happened, made immediately after it occurred, was held admissible; *R. v. Foster*, 6 C. & P. 325; E. C. L. R. 25.

^b *Brazier's case*, 1 East, P. C. 444; *R. v. Clarke*, 2 Stark. C. 243; E. C. L. R. 3; *Trelawny v. Colman*, *ib.* 191. The fact of a complaint being made is evidence to confirm the prosecutrix's story, but the particulars are not evidence; and they properly cannot be elicited for the prosecution, see *R. v. Megson*, 9 Car. & P. 420; E. C. L. R. 38; *R. v. Guttridge*, 9 Car. & P. 472; E. C. L. R. 38; *R. v. Walker*, 2 M. & Rob. 212; and see *post*, Vol. II. tit. RAPE. On an indictment for shooting at the prosecutor, Patteson, J., held that evidence was admissible to show that the prosecutor, immediately after the injury, had made communication of the fact to another, but that the particulars could not be given in evidence; *Rex v. Ridsdale*, York Spring Assizes, 1837.

^c Acts of ownership can only prove that which would be better proved by title-deeds or possession. Acts of ownership, where submitted to, are analogous to

enjoyment have been of long continuance, the law in many instances makes that possession and enjoyment conclusive as to the right, and in all cases renders such evidence admissible, on the reasonable presumption that unless those acts and possession had been founded in right, they would have been resisted by him whose right was violated. But the admission of such acts of possession and enjoyment in evidence frequently introduces a question as to their nature and quality, for on this must depend the question, whether they furnish any inference of acquiescence in an adverse enjoyment. This again must be decided by the mode and circumstances of enjoyment, and for this purpose the contemporary declarations of the parties concerned are necessary and essential evidence. If, for instance, the question be whether *A.* has a right of way to his house over the close of *B.*, and evidence be given that on a particular occasion the occupier of *A.*'s house used the close as a way, the whole force and efficacy of the evidence may depend on what was said at the time. If, on the one hand, it were proved that at that time the occupier of *A.*'s house asked the permission of the owner or occupier of the close to use the way, the fact, instead of affording evidence of an adverse right, would be strong to negative the right; if, on the other hand, the right to use was asserted and acquiesced in, the fact would afford evidence of acquiescence on the one hand, and of right on the other. The case of *Doe dem. *Human v. Pettet*^s may be cited in illustration of these [*471 remarks.

admissions or declarations, by the party submitting to them, that the party exercising them has a right to do so, and that he is therefore the owner of the property upon which they are exercised; *per* Best, J., in *Hollis v. Goldfinch*, 1 B. & C. 205; E. C. L. R. 8.

^s 5 B. & Ald. 223; E. C. L. R. 7; and see *Carne v. Nicholl*, 1 Bing. N. C. 430; E. C. L. R. 27; *Doe dem. Daniel v. Coulthred*, 7 Ad. & E. 235; E. C. L. R. 34. In the case of *Doe v. Rickarby*, 5 Esp. C. 4, which was an action of ejectment on an alleged forfeiture of a lease for breach of a covenant not to injure or underlet, by *underletting*; it appeared, that after the house had been for some time empty, Mrs. *Luthman* was found in possession; and it was held, that the plaintiff was at liberty to prove that a witness on his behalf had inquired of Mrs. *Luthman* in what way she occupied it, and to give her answer in evidence. This case, however, goes to a great length: it is difficult to say that such an answer can be admissible as original evidence during the life of the declarant, except on the ground that she was the agent of the party to be affected, or that the declaration was evidence, as accompanying the fact of possession. But there was no sufficient proof of agency to let in such declaration, and the declaration was not admitted as explanatory evidence of a contemporaneous act, but rather to prove a by-gone fact,

Human was the purchaser of lands. After his death, which was thirty years ago, his widow continued in possession for more than twenty years, and died; the question between the heir-at-law of the husband and the heir-at-law of the wife was, whether the possession by the wife was an adverse possession; and it was held, that her declarations during her possession that she held for her life only, and that after her death the premises would go to her husband's heir-at-law, were admissible to rebut the Statute of Limitations, 21 Jac. I., c. 16. They were not used to show the quantum of her estate, but only to explain the nature of her possession.

*472] *Upon similar grounds, title-deeds and testaments are admissible evidence of the rights of property.^a

Even modern deeds are also evidence to show the title of a party to a particular estate, when a sufficient ground has been laid by proof of the ownership of the party from whom the title is derived. Thus it is every-day's practice to prove the title of *A. B.* to an estate, by proof of the execution of a conveyance by *C. D.* a former owner in possession of the estate. In such cases the evidence does not come within the objection of *res inter alios*; the deeds are nothing more than solemn declarations and admissions of the parties, accompanying and evidencing the nature of the act of transfer, and do not affect or conclude the rights of any stranger, any more than the mere fact of delivering the possession would conclude him. It is evidence of the same nature, as if a plaintiff in trover were to prove his ownership of a horse, or other chattel, by showing that he bought him for a particular sum at a fair.

the nature and terms of the original entry. In some instances, the admissibility of declarations by former occupiers, on the ground that they were against the interest of the declarants at the time, has been carried to a great length; see *Walker v. Broadstock*, 1 Esp. C. 458. Upon the trial of an indictment for obstructing a highway, the question was, whether the road was public or private; and it was held, that the declaration of a deceased occupier at the time of planting an alleged boundary willow, was inadmissible, either as a declaration accompanying an act, or as contrary to the party's interest, or as evidence of reputation; *Reg. v. Bliss*, 7 Ad. & E. 550; E. C. L. R. 34; and see *Tickle v. Brown*, 4 Ad. & E. 369; E. C. L. R. 31.

^a *Supra*, p. 64, 65, 186; and see the cases there cited. A counterpart of a feoffment by a corporation, produced from their muniments, without proof of rent ever having been received in respect of the property, is inadmissible; *Lancum v. Lovell*, 6 C. & P. 441; E. C. L. R. 25; 9 Bing. 465; E. C. L. R. 23. The defendant justified breaking floodgates, as lessee of the Bishop of *W.*; old leases were produced from the registry, and admitted; *Wakeman v. West*, 7 Car. & P. 479; E. C. L. R. 32.

Such evidence, as a mere fact, and part of the *res gestæ*, is admissible against all the world; it operates to the conclusion of no one without his assent, but merely so far as in its own nature it affects the transaction itself. For its force and effect, the evidence depends entirely upon its connection with the acts of ownership and possession; proof of the execution of deeds by parties wholly unconnected with the estate would avail nothing to prove a title.

Maps and surveys of estates are also evidence to show the extent of a man's estate, when it appears that they have been made with the privity and consent of the owners of *the adjoining lands. *A.* being seised of the manors *B.* and *C.*, during his [473] seisin caused a survey to be taken of *B.*, which was afterwards conveyed to *E.*; and upon a dispute between the lords of *B.* and *C.*, it was held that the survey was admissible in evidence.¹

But it is clear that no entry or survey taken by an owner would be evidence either for himself, or for one who claimed through him, against a party who did not claim in privity, since it might encourage persons to include in surveys more than belonged to them;^k and, therefore, survey-books of a manor, although ancient, unless signed by the tenants, or unless they appear to have been made at a court of survey, are not evidence; they are mere private memorials.^l

So it has been said, that an old map of lands has been allowed in evidence, where it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase.^m It does not clearly appear under what circumstances this old map was held to be evidence, but it seems that one ingredient essential to its admissibility was its agreement with boundaries as adjusted in an ancient purchase, that is with some other instrument; and the term *adjusted* seems to imply some privity on the part of the owners of adjoining property, if the vendor was not himself the owner. A map annexed to a deed seems to stand on the same footing as the description contained in the deed itself.

¹ *Bridgman v. Jennings*, 1 Lord Raym. 734. The only case, it is said, where a map is receivable in evidence, is where at the time it was made the whole property belonged to the person from whom both parties claim; *Doe v. Lakin*, 7 C. & P. 481; E. C. L. R. 32. In an action for breaking down floodgates, a map of the owner's and of adjoining lands is not admissible to show the course of the stream to the plaintiff's mill; *Wakeman v. West*, 7 C. & P. 479; E. C. L. R. 32.

^k Str. 95; 1 Lord Raym. 734; *Outram v. Morewood*, 5 T. R. 123.

^l 12 Vin. Abr. 90, pl. 12; *per* Bacon, Exon, Summ. 1719.

^m Gilb. Law of Ev. 78.

*474] "It is an established principle of evidence, that if a party who has peculiar knowledge of the fact, by his written entry, or even declaration concerning it, discharges another upon whom he would otherwise have a claim, or charges himself, such entry is admissible evidence of the fact after the death^a of the party.¹

Thus, upon a trial at bar, where the question was, whether a surrender of the mother's estate for life had been made when the son suffered a common recovery, the court admitted in evidence the debt-book of an attorney, (deceased,) in which he had made charges for suffering the recovery, and for drawing and engrossing a surrender of the mother, which were therein acknowledged to have been *paid*; and the court held, that this was a material circumstance upon the inquiry into the reasonableness of presuming a surrender, and could not be suspected to be done for that purpose; and that since the attorney was dead this was the best evidence.²

^a Where entries were made against the interest of a party who had quitted the kingdom, there being charges of a criminal nature against him, but was still living, it was held, that such entries could not be read; *Stephen v. Gwenap*, 1 M. & Rob. 120; and see *Smith v. Whittingham*, 6 C. & P. 78; E. C. L. R. 25; *Spargo v. Brown*, 9 B. & C. 935; E. C. L. R. 17; *Fursdon v. Clogg*, 10 M. & W. 572; and *Sussex Peerage case*, 11 Cl. & F. 85, p. 465. Parol evidence is admissible of a declaration by a devisee that she was merely a trustee; *Strode v. Winchester*, 1 Dick. 397.

^o *Higham v. Ridgway*, 10 East, 109, *infra*. It has been said that an additional circumstance is necessary, *viz.* that the party who made the entry might have been examined as to it, had he been living; *per* Bayley, J., in *Higham v. Ridgway*. It is, however, observable, that in that case three of the Judges lay down the rule without this qualification; and in the case of *Short v. Lee*, 2 Jac. & Walker, 464, the Master of the Rolls held, that an entry by a deceased person was admissible, although he could not, in his lifetime, have been examined to the fact; and this is certainly most consistent with the principle upon which such evidence is admitted. Hence the Court of Exchequer negatived any such qualification in the case of *Gleadow v. Aikin*, 1 Cr. & M. 410.

^p *Warren v. Greenville*, Str. 1129. Note, this was forty years after the time of the surrender, and the Court said that they would have *presumed* a surrender after such a length of time, without this additional evidence. In *Goodtitle v. Duke of Chandos*, 2 Burr. 1072, Lord Mansfield says, that the Court did rely upon the

¹ *Chase v. Smith*, 5 Vermont, 558; *Thompson v. Stevens*, 2 Nott & McCord, 493. If made in the usual course of the business or duty of the party making the entry it is not necessary that it should be against his interest; *Augusta v. Windson*, 1 Appleton, 317; *Brewster v. Doane*, 2 Hill, 537; *Gale v. Norris*, 2 McLean, 469; *Kendall v. Field*, 2 Shepley, 30; *Doe v. Sawyer*, 28 Maine, 463; *Thomson v. Porter*, 4 Strobhart Eq. 58; *Arms v. Middleton*, 2 Barbour, 571.

So in *the case of *Higham v. Ridgway*^a it was held, that an entry made by a man-midwife in his book of having delivered a woman of a child on a particular day, referring to his ledger in which he had made a charge for his attendance, which was marked as *paid*, was evidence upon the trial of an issue as to the age of such child at the time of his afterwards suffering a recovery. [*475]

It was held, in the case of *Doe v. Robson*,^r that entries of charges made by an attorney in his books, *showing the time when a lease prepared for a client of his was executed, which charges it appeared had been paid, were evidence after the attorney's death to show the time of the execution, which was a material fact in issue. [*476]

By a promissory note *A. B.* and *C.* jointly promised *D.* to pay him £300, and interest. *B.* paid *D.* £280 on account of the note, and *D.* indorsed on it, "Received of *B.* £280 on account of the within note; the £300 having been originally advanced to *A.*" *B.* having afterwards paid the whole amount sued *C.* as a co-surety for contribution, and it was considered that the indorsement, after

entry; but he also states from his own note, that the Court said, that after forty years they would, without any other circumstances, presume a conditional surrender; see also the last preceding note. In *Doe v. Wright*, Lancaster Summer Assizes, 1836, Coleridge, J., admitted a bill of costs by an attorney, stating facts and business done which had been paid, on the same footing as original entries in the book.

^a 10 East, 109; 2 Smith, L. C. 182. The evidence seems to have been received in this case principally upon the ground, that the entry was made of a fact within the peculiar knowledge of the party, against his interest. In *Doe dem. Gallop v. Vowles*, 1 M. & Rob. 261, in order to show that the mortgagee had done some repairs to certain premises, with a view to prove that the defendant had not had an adverse possession, the lessor of the plaintiff produced a bill for the repairs, with a receipt for the amount of it in the handwriting of a deceased carpenter, which had been found among the mortgagee's papers; but Littledale, J., rejected it as evidence of the work having been done, inasmuch as the paper itself was the only evidence that the demand ever existed, and that the foundation for it, as in *Higham v. Ridgway*, should have been laid by showing the work to have been done; but in *R. v. Inhabitants of Lower Heyford*, Gloucester Summ. Assizes, 1840, 2 Smith's L. C. 194, Parke, B., denied the existence of this distinction, and admitted the book of a deceased mason, containing charges for repairing a bridge marked as paid, as good evidence of such repairs without further proof; and see *Doe v. Burton*, 9 Car. & P. 254; E. C. L. R. 38.

^r 15 East, 32. So to show payment of mortgage-money by mortgagor by whom he was employed, *Clarke v. Wilmot*, 1 Y. & C. 53.

D.'s death, was evidence for the jury, not only of the payment of the £280, but that it was advanced to *A.* as principal.³

An entry by a rector of his receipt of tithes is evidence for the successor; for the entry could not have been of any benefit to himself.⁴ Lord Kenyon, however, considered this as an excepted case, since in general a man's private entry cannot affect the rights of third persons;⁵ and therefore in *Outram v. Moorewood*,⁶ where the question was whether a particular close was part of an estate which formerly belonged to Sir *J. Zouch*, it was held, that entries of the receipt of rents made by one from whom the *defendant
*477] derived his title to the rent of this close, but nothing more, was not evidence for the defendant in order to prove the identity of the close and to establish his title to the coals, on the ground that the entries were no more than the private memoranda of the party, not upon oath, which ought not to bind third persons; and it was distinguishable from the case of *Barry v. Bebbington*, since there the steward charged himself with the receipt of the money. It appears therefore to be clear, that a man's own private entry as to his own rights, which admits no liability to another, is not evidence either for himself or those who claim under him. The case of an entry of the receipt of tithes by the rector stands upon very peculiar grounds; he has no personal interest in making the entry with a view to any claim made by himself, since the entry would not be evidence for him; and the incumbent for the time being, and not his heir or personal representative, would afterwards derive benefit from such entry.

Lord Hardwicke observed, that it was going a great way to

³ *Davies v. Humphreys*, 6 M. & W. 153.

⁴ 5 T. R. 123; Bunb. 46; 2 Ves. 43; and was against his interest, as it would have been evidence to discharge the parishioners, *per Plumer*, M. R., 2 Jac. & W. 475. So in a suit for tithes by the lessee of an ecclesiastical corporation aggregate, to whom the rectory belonged, ancient documents in their possession, purporting to be accounts furnished by some of their members employed to collect the tithes, and appearing to be offered and settled, are admissible in evidence; *Skort v. Lee*, 2 Jac. & W. 464. An entry by a deceased rector is also evidence by way of admission against a successor. An ancient document signed by the rector, and headed, "notification of the tithes of the parish," although not coming out of the proper repository of a terrier, was held to be admissible evidence against a succeeding rector, as the admission of one of his predecessors, and upon the principle of a receipt; *Maddison v. Nuttall*, 6 Bing. 226; E. C. L. R. 19.

⁵ 5 T. R. 123.

⁶ 5 T. R. 121.

admit the books of a deceased rector as evidence for his successor,⁷ but that it had been allowed, because the rector knew that the entry could not benefit either himself or his representative, who had nothing to do with the living.⁸ The admissibility of such evidence seems to rest upon the principles⁹ already announced.

*In the case of *Searle v. Lord Barrington*,^b the court is said to have extended this principle so far as to hold, that in an [*478

⁷ 2 Ves. 43; and see *Illingworth v. Leigh*, 4 Gwill. 1618; *Woodnoth v. Lord Cobham*, 2 Gwill. 653.

⁸ Such evidence has, however, been received in favour of his successor, where the entries have been made by an improper rector, although there the party who made the entries might benefit his own inheritance; 4 Gwill. 1618; 2 Gwill. 653; Bun. 180; but see *Le Gross v. Lovemoor*, 2 Gwill. 529; *Perigal v. Nicholson*, 1 Wightw. 63. Lord Kenyon's observation, *Outram v. Morewood*, 5 T. R. 123. No proprietor or corporation sole, except a rector or vicar, can make such evidence for his successors, and even in those cases the liberty has been allowed with regret; *Short v. Lee*, 2 Jac. & W. 464.

⁹ *Supra*, pp. 64, 65; and see Lord Ellenborough's observations in *Doe v. Rawlins*, 7 East, 279.

^b Str. 826. The bond was dated June 24, 1697; the indorsement of interest on the bond, under the hand of the *obligee*, was dated in 1707, being three years before the death of the obligor; and the cause was first tried Trin. 1724. Pratt, C. J., was of opinion that this indorsement was not evidence; but the three other Judges were of opinion that it ought to have been left to the jury, for they might have reason to believe that it was done with the privity of the obligor; because it was the constant practice for the obligee to indorse the payment of interest, and that for the sake of the obligor, who is safer by such an indorsement than by taking a loose receipt. Upon a second trial, Lord Raymond, C. J., admitted the evidence, and a bill of exceptions was tendered, and after judgment in the King's Bench for the plaintiff, a writ of error was brought in the Exchequer Chamber; and upon argument, five of the Judges were of opinion to affirm, and two to reverse, the judgment. The judgment was afterwards affirmed in the House of Lords. In *Barnes v. Ransom*, 1 Barn. 432, a similar indorsement seems to have been admitted, though made after the presumption of payment had taken place. See Mr. Nolan's note to the former case, in his edit. of *Strange*, 826. In a copy of select cases of evidence, there referred to, it is stated, that at the sittings after Michaelmas Term at Westminster, 6 Geo. III. Lord Camden said that he was never much pleased with the determination of *Searle v. Lord Barrington*; however, he said, it was law: see Vol. II. tit. BOND. In *Gleadow v. Atkin*, 1 Cr. & M. 428, an action on a bond, there was proof of payment of interest to a third person, and to connect that with the bond an indorsement on the bond by the obligee, stating that the bond was for trust money for that third person, of even date with the bond, was held to be admissible. So an indorsement of the receipt of interest on a promissory note made by the payee, since deceased, was held admissible to repel the Statute of Limitations; *Gale v. Capern*, 1 Ad. & E. 102; E. C. L. R. 28. In consequence of these decisions the stat. 9 Geo. IV. c. 14, s. 3, provided, that no such indorsement made by or on account of the party to whom

action upon a bond, a receipt for interest indorsed upon it by the obligee himself, is evidence to go to a jury to rebut the presumption of payment arising from lapse of time. If this case is to be taken as an authority for the general position, that an indorsement
 *479] of the receipt *of interest on a bond bearing date within the space of twenty years from the date of the bond, shall in itself, and without any proof that it was actually made within that space of time, or with the privity of the obligor, be evidence to rebut the presumption of payment, it seems to be difficult to support it upon principle; for it amounts to this, that in this particular case the party shall have an opportunity of making evidence in his own closet, in order to rebut a presumption which would otherwise arise against him. If this be so, the case must be regarded as anomalous, and as an exception to the plain fundamental rule, that a man shall not be permitted to make evidence for himself.^e If, on the other hand, this further limitation is to be applied to the reception of such evidence, that reasonable proof shall be adduced to show that the indorsement existed before the presumption of satisfaction had arisen, the doctrine seems to be more consonant with the principle above stated; a presumption arises that the obligee would not falsely and wantonly make an indorsement prejudicial to his own interest at the time,^d from which he could derive no benefit. It seems to be clear, at all events, that such evidence would be inadmissible, if the indorsement appeared to have been made after the presumption had arisen.^e

Entries by which receivers, stewards, bailiffs, and other agents
 *480] charge^f themselves with the receipt of money are *in general admissible in evidence to prove the facts entered after they

such payment shall be made, shall take the case out of the Statute of Limitations. See Vol. II. tit. LIMITATIONS; and tit. BOND.

^e See Lord Hardwicke's observations in the case of *Glyn v. The Bank of England*, 2 Ves. 43, and Lord Kenyon's, 5 T. R. 123; and Lord Ellenborough's, in *Rose v. Bryant*, Camp. 323.

^d In the case of *Glyn v. The Bank of England*, 2 Ves. 42, Lord Hardwicke said (of this case) he took it that the indorsements were *made* and bore date within twenty years. And in *Turner v. Crisp*, 2 Str. 827, it was said, the indorsement appeared to have been made before it could be thought necessary to make evidence to encounter the presumption. It does not appear, however, from the report that any such evidence was given.

^e *Turner v. Crisp*, Str. 827; 2 Ves. 43; *Serle v. Lord Barrington*, Lord Raym. 1370.

^f But, although an entry by a steward in his books in his own favour, uncon-

are dead, for (as it is said) it is reasonable to be presumed that a man would not wantonly charge himself with any responsibility;^g and evidence to show that the party making the entry had knowledge of the fact is unnecessary.^h

Accordingly it has been heldⁱ that an entry in the *parish books, made by the officers of one township, of the receipt [481 of a portion of the church-rates from the officers of another township, was evidence to charge the latter with the payment of the same sums in future; and that the title at the head of the page, stating the customary proportion to be so paid, was also evidence. A private book kept by a deceased collector of taxes, containing entries by him, acknowledging the receipt of sums in his character of collector, was also held to be admissible evidence in an action

nected with other entries charging himself, is not evidence of the facts stated in such entry; *Knight v. Marquis of Waterford*, 4 Y. & C. 284; *Doe dem. Kinglake v. Beviss*, 7 C. B. 456; E. C. L. R. 62; yet the mere fact of the final balance upon the account being in the steward's favour does not affect the admissibility of an entry charging himself; *Williams v. Greaves*, 8 C. & P. 592; E. C. L. R. 34; *Rowe v. Brenton*, 3 M. & R. 268. But there must be an admission to charge the party: thus, in *Doe dem. Kinglake v. Beviss*, 7 C. B. 456; E. C. L. R. 62; accounts of the receiver of one of the hundreds into which the manor of Taunton Deane is divided, in which were entries of sums received and paid by the reeves from and to the woodward, and amongst them the payment which was material in the action, were rejected, because it did not appear that the reeve in any part of the accounts acknowledged the receipt of the specific sum for which he so claimed credit.

^g In an action by the lord for copyhold fines, the book kept by the steward of all fines assessed, whether paid or not, was offered in evidence to prove the payment of fines by remainder-men, as it was accessible to all the copyholders, and had been received by the steward from his predecessor; but it appeared that the steward made up a second book at the end of each year, in which he entered all fines which had been paid; and it was held that the evidence was inadmissible; *Ely, Dean, &c. v. Caldecott*, 7 Bing. 433; E. C. L. R. 20.

^h *Crease v. Barrett*, 1 C. M. & R. 919; where it is said that the absence of such knowledge goes to the weight not the admissibility of the entry. Whether a verbal declaration of a collector of rents at the time of paying over money as to the person from whom he received it is evidence against the latter, *quære*, *Fursdon v. Clogg*, 10 M. & W. 572. A verbal declaration was treated as admissible in *The Sussex Peerage case*, 11 Cl. & F. 103.

ⁱ *Stead v. Heaton*, 4 T. R. 669; 2 Ves. 42; Bunb. 180; *Outram v. Morewood*, 5 T. R. 121; 3 Wood, 332. Old rates made by the parish officers of B. on the occupiers of land as parcel of B., and an account containing an overseer's account, in which against the sum for which the occupier had been assessed crosses were made, were held to be evidence that the sum assessed had been paid by the occupiers; *Plaxton v. Dare*, 10 B. & C. 17; E. C. L. R. 21.

against his surety, although the parties who had paid them were alive, and might have been called.^k

In an action of trespass, entries by the steward of a former owner of the *locus in quo* in his day-book, of sums received from different persons in satisfaction of trespasses, are evidence; and it was held, that whatever would have charged the steward would be admissible evidence.¹

So, old rentals, by which bailiffs have acknowledged the receipt of moneys, are evidence of the payment of such rents, and of the right to receive them, if the bailiff or receiver be dead.^m But
 *482] although the account of a bailiff *or steward, who by marking particulars items of receipt appears to have collected them, be evidence, it must appear from the subscription of his name or otherwise "that it was part of the account of the steward or bailiff; for, in the absence of such evidence, it may be nothing

^k *Middleton v. Melton*, 10 B. & C. 317; E. C. L. R. 21. See also *Doe v. Cartwright*, R. & M. 62, E. C. L. R. 21, and *McGahey v. Alston*, 2 M. & W. 206. In the case of *Whitnash v. George*, 8 B. & C. 556, E. C. L. R. 15, it was held that entries made by a clerk to bankers, in books kept by him in his capacity as clerk, were admissible in evidence after his death, in an action by the bankers against his surety, on a bond conditioned for the faithful discharge of his duty as such clerk. And it was held that such entries were admissible, *not altogether* (according to Lord Tenterden) as declarations made by him against his interest, but because the entries were made by him in those very books which it was his duty as such clerk to keep; and, *per* Bayley, J., the case of *Goss v. Watlington*, 3 B. & B. 132, E. C. L. R. 7, was decided on the same principle.

¹ *Barry v. Bebbington*, 4 T. R. 514.

^m *Manning v. Lechmere*, 1 Atk. 458; *Musgrave v. Emmerson*, 10 Q. B. 326, E. C. L. R. 59, *post*, note (p.) Where customary payments were entered as such in ancient receiver's accounts, but were not uniformly in the same language, or in precise language, they were held evidence of the custom; *Duke of Beaufort v. Smith*, 4 Ex. 450.

" Entries in a deceased agent's accounts, charging him with receipts, although not in his handwriting, but signed by him, are admissible; *Doe v. Stacey*, 6 C. & P. 139; E. C. L. R. 25. A book in the handwriting of *A. B.*, purporting to contain accounts of tithes collected by him seventy years ago, cannot be read in evidence without proof that *A. B.* was collector of tithes at the time; *Short v. Lee*, 2 Jac. & W. 464; but the statutes of an ecclesiastical corporation aggregate enjoying the appointment of collectors, together with the internal evidence of the documents, and their coming out of the proper custody, amounts to sufficient proof that the parties were really collectors; *Ibid.* In case for disturbance of the plaintiff's market, accounts signed by a party styling himself the steward's clerk, without any evidence to show that he was such *dehors* the papers themselves, and not purporting to charge the party whose signature they bore, were on motion held to be inadmissible, and the court not being satisfied that such evidence might

more than a leaf drawn out of a book by the lord of the manor himself.^o

*Upon a question, whether certain ancient rentals, preserved in the archives of the dean and chapter of Exeter, were entries made by their receivers, charging themselves with the receipt of rents, it was held, that the books of modern receivers were not evidence for the purpose of laying a foundation by comparison, and of showing that the ancient books kept in the same manner, and containing similar entries of receipts and payments, were also receivers' books, and entitled to be read in evidence as such.^p But if from the inspection of such ancient books, and the language of the entries, it appear probable that they were in fact receivers' books, it seems that they are admissible in evidence.^q [*483

not have weighed with the jury, granted a new trial; *De Rutzen, Baron, v. Farr*, 4 Ad. & E. 53; E. C. L. R. 31.

A deceased receiver had rendered annual accounts to his employer of rents received by him from property at H. They were not signed by any one. Another was in the handwriting of a deceased clerk, but on it the receiver had written H. rents. Another was in the writing of the receiver's son, who proved that he made it out by his father's authority, and that it was rendered to the employer in the usual course. They were all received by Lord Denman, C. J., in evidence; *Doe dem. Sturt v. Mobbs*, Car. & M. 11; E. C. L. R. 41. And entries of a deceased officer charging himself were received, though written by his agent authorized for the purpose, without calling the agent, and such authority is shown by the officer producing them at an audit; *Doe d. Graham v. Hawkins*, 2 Q. B. 212; E. C. L. R. 42.

^o *Frankes v. Cary*, 2 Atk. 140. And where bailiff's accounts were not signed, but were drawn out in four columns, in the first and second of which the tenants' names and the amount to be paid by each were entered in the handwriting of the landlord; and in the third and fourth the amounts received and the date of the receipt were entered in the handwriting of a deceased steward, they were received by Coleridge, J.; *Doe dem. Bodenham v. Colcombe*, Car. & M. 155; E. C. L. R. 41.

A computus purporting by the title to be that of *Thomas Robyn*, propositus or reeve of Padstow in the 33rd year of Hen. VI., containing receipts of moneys with which he charged himself, and brought from the muniment room of the plaintiff who claimed under the grantee of the port, were admitted by Lord Denman, although not signed, and there was no proof that it was in the receiver's handwriting; and it was said that such documents of the same age were never signed; *Brune v. Thompson*, Car. & M. 34; E. C. L. R. 41.

^p *Doe v. Thynne*, 10 East, 206.

^q In the case of *Doe v. Thynne*, 10 East, 206, the language of several entries imported that *N. W.* was therein accounting to the Dean and Chapter for money paid to himself, with the receipt of which he debited himself by the words *solvit mihi*, and *solvit per me*; and the Court of King's Bench were of opinion that the books which had been rejected at the former trial ought again to be submitted to

*484] Thus in an action by the corporation of *Exeter, for jetty customs and port dues on goods landed at Teignmouth, the plaintiffs, to show the receipt of such dues in former times, produced a series of accounts purporting to be the receipts by the receivers of the city. It was proved that the receivers' accounts were regularly audited, and that no one could, at the time to which the evidence related, be mayor till he had been receiver and had his accounts audited. Down to a certain time the accounts were not signed at all; afterwards they were regularly signed by the auditors only. One entry of this latter class stated a receipt by a receiver, *B.*, of a sum for town dues from *W.*, and with this was found a paper stating that *B.* had received a sum for town dues almost exactly corresponding with that stated in the entry and bearing date at the same time. No evidence was given of the handwriting of the latter paper, but *B.* and *W.* were dead, and the documents were more than thirty years old. Although the third person was used throughout in these documents, and no one stated the receipt to have been "by me," they were held to be admissible.^r

A book of accounts, kept by an executor and trustee of an estate directed to collect and apply the rents for the benefit of the *cestui que trust*, is admissible as charging himself, to prove seisin in a writ of right.^s So the book of a bursar of a college is said to be evidence as to money paid by him, or received to the use of a stranger.^t

Where a bill of lading had been signed by a master of a vessel, since deceased, for goods received by him to be *delivered
*485] to a consignee or his assigns, on his paying freight, the

the consideration of the jury. So in order to prove payment of fee-farm rents for three years previously to 21st January, 1731, (for the purpose of satisfying the requirements of 4 Geo. II. c. 28, s. 5,) books were produced from the custody of the present receiver, who had charge of the rentals and title deeds, containing rent rolls for many years, with entries of sums received in respect of several rents, and among them that in question, but not signed. A paper was also produced from the same custody, signed by *E. R.*, deceased, styling himself an accountant debtor to the claimant's ancestor, wherein he charged himself with the receipt of an aggregate of rents, not stating the items, corresponding with the amount in the books. The court held that the paper containing the accounts and the books were sufficiently connected and were evidence to prove the seisin of the rent in question; *Musgrave v. Emmerson*, 10 Q. B. 326; E. C. L. R. 59.

^r *Mayor of Exeter v. Warren*, 5 Q. B. 773; E. C. L. R. 48.

^s *Spiers v. Morris*, 9 Bing. 687; E. C. L. R. 23.

^t *Anon.*, Lord Raym. 745. *Qu.*, Under what circumstances? The report is a very loose one. It appears to mean against the bursar.

document was held to be evidence to show that the consignee had an insurable interest in the goods;" but if, in such case, the master should guard his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading, it is said, would not be evidence either of the quantity of the goods, or of property in the consignee.^v

In the case of *Pyke v. Crouch*,^x it was held, that a letter written by a stranger to a testator, acknowledging the receipt of a will, was evidence to show that such a will had been sent by the testator.

Upon the same principle other entries and declarations against the pecuniary or proprietary interest^y of the persons making them, have been held admissible after their deaths. Thus where *A.*, a tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from his confidential agent, containing an account of the tenants and rents, on which the tenant for life indorsed the words, "a particular of my estate," and handed it down to *B.*, the succeeding tenant for life, who had a like limited power of leasing, by whom it was preserved, and handed down, amongst the muniments of the estate, to the first tenant in tail, it was held, that the document was evidence for the first tenant in tail against the lessee of *B.*, in order to show that the rent reserved by *B.*, the tenant for life, was less than the ancient rent which was reserved at the time to which the paper referred, the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, and who had an interest the
 *other way; viz., to diminish the rent, in order to increase [486
 his fine upon a renewal under the power.^z

Where the question was as to the property in a horse seized by the defendant under a heriot custom, a declaration by *A. B.*, a third person, that he had given up his farm and all his stock to the plaintiff, was held to be admissible for the plaintiff for the purpose of proving that the horse belong to the plaintiff before the death of *A. B.*^a

^u *Per* Lawrence, J., *Haddow v. Parry*, 3 Taunt. 303.

^v *Ibid.*

^x *Ld. Raym.* 730. And see *Marks v. Lahee*, 3 Bing. N. C. 408; *E. C. L. R.* 32.

^y These statements, in order to be receivable as being made against the party's interest, must be made while that interest continues, and are inadmissible if made after its termination; *Crease v. Barrett*, 1 C. M. & R. 919; *Lord Trimlestown v. Kemmis*, 9 Cl. & F. 779.

^z *Roe dem. Brune v. Rawlings*, 7 East, 291.

^a *Ivatt v. Finch*, 1 Taunt. 141. Note, that in this case the defendant claimed

But it must appear that such declaration or entry was *against* the interest of the party making it, in order to be admissible; and if it do not so appear it will be rejected. Thus, in *Reg. v. Inhabitants of Worth*,^b an entry by a deceased master in a book in which he was in the habit of entering the hirings of his servants, which was as follows: "April 4th, 1824. *W. Worrell* came, and to have for the half-year, 40s. Sept. 29. Paid this £2. Oct. 39 Came *again *487] and to have 1s. per week to March 25th, 1825, is twenty-one weeks, two days, £1 1s. 6d. 25th. Paid this;" was tendered in evidence to prove the hiring in a settlement case, but was held inadmissible, on the ground that as it merely showed a contract which must be supposed to be made on equitable terms, the entry was not against the interest of the master.

The declarations of^c deceased tenants have in many instances been admitted in evidence, on matters connected with their tenancies, principally, as it seems, upon the ground that their declarations were made against their own interest.

through *A. B.*, upon whose death he became entitled to a particular portion of his personal property as a heriot. And see *Coule v. Braham*, 3 Ex. 183.—*A.* had taken the goods of *B.* in execution, and the sheriff having executed a bill of sale to him, *B.* was permitted to remain in possession, and the sheriff afterwards took the same goods in execution at the suit of another creditor of *B.* In an action by *A.* against the sheriff for the goods, it was held, that the declarations of *B.* as to the property of the goods, and that *A.*'s execution was merely colourable, were admissible for the sheriff; *Willies v. Farley*, 3 C. & P. 395; E. C. L. R. 14; and see *Prosser v. Gwillim*, 1 C. & K. 95; E. C. L. R. 47; *Gully v. Bishop of Exeter*, 5 Bing. 171; E. C. L. R. 15. But a declaration by a former occupier of land, over which the plaintiff claims an easement, is not admissible against the latter; *Scholes v. Chadwick*, 2 M. & Rob. 507. In trover by a purchaser of goods afterwards sold by the defendant (the sheriff) under a *fi. fa.*, statements by the vendor and execution debtor were held by Wightman, J., to be inadmissible for the defendant, the plaintiff claiming adversely to, and not under the debtor; *Roberts v. Justice*, 1 C. & K. 93; E. C. L. R. 47. The same point was so ruled in *Stothert v. James*, *ibid.* 121, by Maule, J., who observed that the execution creditor claims adversely to the debtor.

^b 4 Q. B. 132; E. C. L. R. 45.

^c Oral declarations depend partly upon the same principles with written entries, but are far weaker in degree; they are usually made with less deliberation, are more likely to be loosely and wantonly made, and are usually unconnected with any regular course and routine of business. The declarations of tenants are not evidence against reversioners, although their acts may be. *Per Patteson, J.*, in *Tickle v. Brown*, 4 Ad. & E. 278; E. C. L. R. 31. Such declarations, to be admissible, must have been made during the tenancy; *Lord Trimlestown v. Kemmiss*, 9 Cl. & F. 779.

In *Doe v. Williams*,^d the question was, whether Mrs. *Galton* (from whom the defendant claimed) was in possession of the premises at the time when she levied a fine; and evidence was admitted by Lord Mansfield of a conversation between Mrs. *Galton* and Mrs. *Pearce* (who was living, but interested as being the present tenant,) in which the one admitted that she had paid rent to the other as her landlord, and the other admitted that she had *received the rent.^e In *Davies v. Pearce*,^f which was an action of re- [*488 plevin, the question was, whether the *locus in quo* was parcel of the tenement B.; evidence was offered by the plaintiff of declarations by deceased tenants of the *locus in quo*, which was part of L., that they rented L. of Mr. *Evans*, who was never the owner of B.; that one tenant had said, that he paid Mr. *Evans* five shillings yearly, and a quarter of mutton, for L., and that he was *then going* to pay that rent to the said *J. Evans* for the said L; and that he had ordered his servant to herd some cattle at L., saying, that otherwise he could not afford to pay Mr. *Evans* his rent. And that another tenant had prevented a person from cutting rushes on L., and threatened that he would tell Mr. *Evans*, his landlord, of his cut-

^d Cowp. 621. Trustees allow one who had an equitable life estate to receive the rents and profits. The latter, while in such receipt, executes a deed reciting the trust, and that he is in possession by permission of the trustees. This recital was held admissible for the trustees, being made in derogation of the apparent right of the *cestui que trust* to be considered as owner of the fee; *Doe dem. Daniel v. Coulthred*, 7 Ad. & E. 235; E. C. L. R. 34. So a declaration by one actually managing property, that he does so in the name of another, is admissible evidence for the latter; *Baron de Bode's case*, 8 Q. B. 207; E. C. L. R. 55.

^e It is observable that the verdict, notwithstanding the admission of the evidence, was for the plaintiff; consequently no question was afterwards made before the court as to the admissibility of this evidence. The evidence itself appears to have been extremely loose, the witness not stating either the occasion or the terms of the conversation, but merely that he remembered a conversation, in which the one admitted that she had paid the other rent as her landlord, and the other that she had received rent from her as tenant. Much in such a case would depend on the object of the conversation, as well as the terms: a settlement of account between the parties as landlord and tenant, as it would bind both, would weigh in evidence as an act done, in the same manner as payment of rent. A declaration by a tenant in possession, since deceased, that he then paid rent to the lessor of the plaintiff, made within twenty years, is evidence of title against the defendant, who had said that he was tenant to H.; *Doe v. Beckett*, 4 Q. B. 601; E. C. L. R. 45. Receipts for rent given by two successive landlords for many years to the tenant, and preserved by the latter, are receivable to show the seisin of those landlords; *Doe d. Blayney v. Savage*, 1 C. & K. 487; E. C. L. R. 47.

^f 2 T. R. 53.

ting the rushes; and once took the rushes from that person, and told him that they belonged to Mr. *Evans*. And that forty years ago *T. H.* rented L. for one year, and said that he paid rent either to Mr. *Evans* or his mother. This evidence was rejected at the trial, and a bill *of exceptions was therefore tendered; but the *489] Court of K. B. was of opinion that the evidence was admissible;^g Ashhurst, J., observing, that the fact of cutting rushes was decisive, and Buller, J., adding, that the other question, relating to the tenant's declaration that he had paid rent for the premises, had been decided in the cases of *Holloway v. Rakes*, and *Doe v. Williams*.^h

In the case of *Holloway v. Rakes*,ⁱ cited by Mr. J. Buller, the question was, whether the devisor of an estate twenty-seven years ago, of which there had been no possession, was seized; and a declaration of a tenant in possession at that time, that he held as tenant to the devisor, was admitted. And the court afterwards held that it had been properly admitted.^k

^g It was not essential, in this case, that the court should give a decided opinion on the mere declarations of the tenants, since other evidence had been rejected; viz., of the fact of cutting down the rushes, and the accompanying declaration which rendered it incumbent to award a *venire de novo*. Mr. J. Ashhurst seems to have founded his judgment upon that point only; Mr. J. Buller indeed went farther, and intimated his opinion upon the bare declarations. It is, however, to be observed, that the case of *Doe v. Williams* does not support that opinion to the full extent; for there the evidence did not rest as a mere declaration to a stranger, but occurred in the course of conversation between the parties, as to a supposed account between them as landlord and tenant; it was of the same nature, though weaker as evidence of an actual payment; and if the letting was by parol, it would have been difficult to have given other evidence of the relation between the parties than their actual dealings and communications on the subject.

^h *Supra*, note (d).

ⁱ 2 T. R. 55.

^k It is to be remarked, that the court seem to have doubted upon the propriety of admitting such evidence in general, since they resorted to another principle to support the admission in that case, namely, the probability that the defendant derived title from the tenant who made the admission, and was therefore bound by it. See, however, *Doe v. Green*, 1 Gow. 227; E. C. L. R. 5. In *Doe dem. Earl Spencer v. Beckett*, 4 Q. B. 601, E. C. L. R. 45, the land in question had been conveyed to the lessor of the plaintiff fifty years before the action was brought: he had not occupied, but one who had done so proved payment of rent by himself to the lessor of the plaintiff within thirty-three years, when *H.* began to occupy: declarations by *H.* that he was then paying rent to the lessor of the plaintiff, made within twenty years of the commencement of the action, were proved. The defendant had acknowledged that he held of *H.* It was considered that he was bound by the evidence which was good against *H.*, and that payment of rent by

*In the case of *Peaceable v. Watson*,¹ it was held, that the declaration of a deceased tenant, of his holding the land of a particular person, was evidence to prove the seizin of the latter, upon the ground that the declaration was against his own interest, since it might have been made use of as evidence against him. [*490]

In the case of *Walker v. Broadstock*,^m where the plaintiff claimed a prescriptive right of common, *pur cause of vicinage*, as appurtenant to his messuage, it was held that a declaration of forty years ago, by a former occupier, since dead, of the plaintiff's messuage, that his cattle had been impounded on Corse Lawn (where common was claimed,) was admissible; and also that declarations by another occupier, though still living, of his opinion that he had no such right of common appurtenant to the messuage, were admissible on the general ground that the declarations of tenants against their own rights are evidence. These cases seem to have established the principle that such declarations are admissible on the ground of being against interest; but it cannot but be remarked that such evidence, to say the least, is exceedingly weak.

*In the case of *Barker v. Ray*, an issue was directed by the Court of Chancery, to try whether *Edmund Barker* the elder, by his will (since his death succeeded, &c., by *Edmund Barker*, his nephew), devised certain estates, &c. Upon the trial evidence was offered of declarations made by *Elizabeth Barker*, the widow of *Edmund* the nephew, both before and after the death of *Edmund* the nephew, tending to show that her husband and the other nephews were only tenants for life. The evidence was rejected, and the jury having found for the defendants, the Lord Chancellor, on an application made by the plaintiff for a new trial, on the ground (amongst others) that the evidence ought to have been received, refused it, without deeming it to be necessary to [*491]

him was proved. This was so held where the question was whether payment of rent was proved so as to satisfy sect. 8 of the statute 3 & 4 Will. IV. c. 27.

¹ 4 Taunt. 16 It would also be evidence against future occupiers, although they did not claim through that person; *Doe dem. Linsey v. Edwards*, 5 A. & E. 95; E. C. L. R. 31.

^m Esp. C. 458. It is to be observed, that in this case the statements of a former tenant who was alive were received, but this would rather appear to be erroneous. Declarations by a party through whom the opposite party claims, are admissible against him, though that person be alive; but this is upon a totally distinct principle, there being a privity between the two. That declarations by a stranger as against his interest are not admissible during his life, see *Phillips v. Cole*, 10 Ad. & E. 106; E. C. L. R. 37; and see the distinction, 1 Ad. & E. 114; E. C. L. R. 28.

give any opinion as to the admissibility of the evidence. Here it is observable, that the declarations offered in evidence were neither coupled with any act, nor made in the discharge of any office or duty, but were the mere voluntary declarations of the wife on her husband's affairs.

Declarations, however, not merely in derogation of the title of the party making them, but whereby that party also gains an advantage, are not admissible under this rule.^a

In some instances, as will afterwards be more particularly considered under the head of Admissions, the declarations of a former owner are evidence in respect of the subject-matter of ownership.^o

^a *Doe v. Wainwright*, 8 Ad. & E. 691; E. C. L. R. 35. In this case a devisee for life under the will of her late husband, conveyed the premises by a deed which recited an outstanding mortgage of the husband, and purported to be made in consideration of forbearance to her as executrix, and of advances made to her. And see *Reg. v. Worth*, *supra*; *Doe v. Lewis*, 20 L. J., C. P., 177.

^o See Vol. II. tit. ADMISSIONS. In *Woolway v. Rowe*, 1 Ad. & E. 114, E. C. L. R. 28, the question was whether Scorhill was parcel of plaintiff's estate, or part of the waste of a manor, the plaintiff having no other interest than right to turn on cattle; and evidence was admitted of a declaration by a former owner and occupier of plaintiff's estate, that he had no right to enclose the down (the *locus in quo*,) although the former owner was alive, and in the court, on the ground of *identity of interest*; and, consequently, as an admission. *Semble*, that the principle, such as it is, of admitting such evidence, is to explain a negative, *i. e.*, the *omission* to enclose. An act of enjoyment, or of right exercised, is admissible; an accompanying declaration is also evidence to explain the nature of the act. And *semble*, a declaration may be also evidence to explain why the party abstained.

In a *quare impedit* between the Irish Society and the Bishop of *Derry*, the Bishop claimed the right of patronage of the living of Camus, in Londonderry, within his diocese. A surrender (not confirmed by the dean and chapter) by a former bishop to the Crown of all the livings in Londonderry, coupled with a grant from the Crown dated two days after the surrender, reciting that all the livings in that county had anciently belonged to the see, were held admissible as an admission by the Crown of that fact against the Society, who proved that before the date of that grant, the Crown had entered into articles of agreement with the Society to grant them the livings in that county, of which the living in question was one; *Irish Society v. Bishop of Derry*, 12 Cl. & F. 641. So letters from the Crown to successive Bishops of *Derry*, directing them to perform the covenants in that grant were held admissible; *Ibid.* Declarations by persons holding a negotiable security, under the *same title*, are admissible; but the right of a party holding under a good title is not to be cut down by the acknowledgment of a former owner that he had no title. *Per Parke, J.*, 1 Ad. & E. 116; E. C. L. R. 28. And see *Beauchamp v. Parry*, 1 B. & Ad. 89; E. C. L. R. 20; *Barrough v. White*, 4 B. & C. 325; E. C. L. R. 10; *Phillips v. Cole*, 10 Ad. & E. 106; E. C. L. R. 37.

And such declarations *are admissible as original evidence, although the person who made them be still living;^p declarations, however, made after such interest has ceased are not admissible.¹ [*492]

The second class of entries² by third persons, to which allusion has been made as being admissible in evidence, is that which comprises memoranda or statements made *in the ordinary course of business by persons since deceased, upon whom the duty of making them has been imposed. The most familiar instance of this class is *Lord Torrington's case*.³ There the evidence was, that according to the usual course of the plaintiff's dealings, the draymen came every night to the clerk of the brew-house, and gave him an account of the beer delivered out, which he set down in a book to which the draymen set their hands, and that the drayman was dead, but that it was his hand set to the book; and it was held to be good evidence of a delivery. [*493]

In the case of *Clerk v. Bedford*,⁴ where the plaintiff, to prove a delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, the evidence was rejected by Lord Raymond, who distinguished it from *Lord Torrington's case*, because there the witness saw the draymen sign the book every night.¹

^p 1 Ad. & E. 114; E. C. L. R. 28.

² *Doe v. Webber*, 1 Ad. & E. 733; E. C. L. R. 28; 3 N. & M. 586; E. C. L. R. 28; *Lord Trimlestown v. Kemmis*, 9 Cl. & F. 779; and see Vol. II. tit. ADMISSIONS.

³ It would seem that oral declarations made in the ordinary course of business would, under like circumstances, be admissible, as well as written entries; see *per* Lord Campbell, *Sussex Peerage case*, 11 Cl. & F. 113.

⁴ B. N. P. 285; 1 Salk. 285; 1 Smith's L. C. 139.

¹ B. N. P. 282; M. 5 Geo. II.

¹ The memoranda of acts by a person who is dead and whose duty it was in the course of the business he had undertaken, to do the acts and make the memoranda of them, is competent evidence for the consideration of a jury to prove that the acts were done; *Welsh v. Barrett*, 15 Mass. Rep. 380. Thus where the messenger in a bank, whose duty it was to deliver notices to makers and indorsers of promissory notes and to make a memorandum thereof, in a book kept by him for that purpose, had made such memoranda; it was held that the book the messenger being dead, was competent evidence to prove the fact of notice, according to the memoranda therein made by him; *Ibid*. So the entries made by a merchant's clerk, he being dead, may be received as evidence, in a case proper for the admission of a merchant's books as evidence; *Ibid*. (This case was fully recognized by the Supreme Court of the United States, in *Nicholls v. Webb*, 8

In the case of *Pitman v. Maddox*,^u in an action upon a tailor's bill, a shop-book was produced, written by one of the plaintiff's servants, who was dead; and upon proof of the death of the servant, and that he *used to make such entries*, it was allowed to be good evidence of the delivery of the goods.* From these cases it may be inferred that some evidence ought to be given to show that such entries were made in the usual routine of business; but perhaps it may not be necessary, as in *Lord Torrington's case*, to prove the signature by one who saw it written.

In the case of *Digby v. Stedman*,^v an entry made by a defendant himself in the course of business, and contemporary with the fact, was received as confirmatory evidence to prove the delivery of
*494] a watch. Again, in *Hagedorn v. *Reed*,^z the entry by a deceased clerk of a merchant in the letter-book of a letter,

^u Lord Raym. 732; 2 Salk. 690.

* See B. N. P. 282.

^v 1 Esp. C. 328. This entry seems to have been used to refresh the shopman's memory. An entry in a tradesman's books certainly is not, merely as such, evidence in his favour; see *R. v. Worth*, 4 Q. B. 132; E. C. L. R. 45; *supra*, p. 486, and note (a), *infra*.

^z 3 Camp. 379. See also *Pritt v. Fairclough*, 3 Camp. 305, where similar evidence was received; *Champneys v. Peck*, 1 Stark. C. 404, E. C. L. R. 2, *infra*. In the case of *Calvert v. The Archbishop of Canterbury*, 2 Esp. C. 645, Lord

Wheat. 326.) So after a lapse of ten years, it was held that a written memorandum made at the time of the transaction, as to notice of protest of a note, may be read in evidence in connection with other evidence. The memorandum was on the back of the note; the demand, protest and notice, were signed by the notary, and these were held admissible; *Hart et al. v. Wilson*, 2 Wend. 513; (*Halliday v. Martinett*, 20 Johns. Rep. 168;) *Butler v. Wright*, 2 Wend. 369; *Bell v. Perkins*, Peck's Rep. 261; *McNeil v. Elam*, Peck's Rep. 268; see also *Farmers' and Mechanics' Bank v. Boraef*, 1 Rawle, 152. But a plaintiff is not a competent witness to prove the handwriting of a person, who made the entries in his book, and who had subsequently died; *Karsper v. Smith*, 1 Browne App. 53; see also *Sterrett v. Bull*, 1 Binney, 234. Where the question was whether a deed, an exemplification of which had been given in evidence, the original being alleged to be lost, was a forgery or not, it was held that a book of accounts belonging to the magistrate, before whom the deed purported to be acknowledged and who was also a subscribing witness, but who was dead at the time of trial, containing charges for taking the acknowledgment of deeds, was admissible in evidence to show that the deed could not have been acknowledged before him; *Nourse v. McCay*, 2 Rawle, 70.

G.

In an action for money had and received by a bank against a depositor who had overdrawn, the books of the bank are competent evidence to show receipts and payments of money; and if the clerk who made the entries be dead or insane, the book is admissible upon proving his handwriting; *The Union Bank v. Knapp*, 3 Pick. Rep. 96.

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with a memorandum stating that the original had been sent to a particular person, was held to be evidence of the fact; proof having been given that it was the invariable course of that merchant's office, that the clerk who copied any letter sent it off by the post, and made a memorandum on the copy that he had done so.¹

Kenyon held, that an entry made in the plaintiff's books, by a servant since deceased, of a contract made with the defendant, was not admissible in evidence to prove the terms of the contract, because the entry did not, as in the case of *Price v. Lord Torrington*, charge the clerk. It does not appear that in this case, the clerk, in making the memorandum, professed to have made it personally with the defendant or his agent; and he might, for any thing that appeared to the contrary, have made it on hearsay from the plaintiff himself. Nor is it said to have been the servant's duty or business to enter the contract.

¹ By an innovation upon the common law, the books of *original* entries of shopkeepers and others have been received in evidence by the courts of some of our States, to prove the sale and delivery of goods and the performance of work and labour, together with the price of the same; but such testimony must be supported by the oath of the plaintiff, that the book produced is his book of *original entries*, and that the items charged were entered by him, at the time of the delivery of the goods or performance of the services or immediately afterwards. In South Carolina (*Lynch v. McHugo*, 1 Bay's Rep. 33; *Foster v. Hinkler*, 1 Bay's Rep. 40; *Slade v. Teasdale*, 2 Bay's Rep. 172;) and Ohio, (*James v. Richmond et al.*, Conover's Dig. 162;) such evidence has been made admissible by statute; but in Ohio, after the lapse of eighteen months from the time of closing the account such testimony will not be received; *James v. Richmond et al.* In Pennsylvania and Massachusetts the courts have themselves modified the rules of law so as to render such evidence competent—the law upon the subject in Connecticut will appear in the cited decisions—while in New York, resistance had been steadily made to such an encroachment upon the settled principles of the common law; *Schermerhorn v. Schermerhorn*, 1 Wend. 119. In the former States the admission of such testimony has been placed upon the grounds of necessity. "In consideration of the mode of doing business in the infancy of the country when many kept their own books, it has been permitted from the necessity of the case, to offer their books in evidence. But when no such necessity exists, when the fact is that clerks have been employed and the entries made by them, there is no cause for violating that wise principle, that no man shall be allowed to give testimony for himself;" *Sterrett v. Bull*, 1 Binney, 244; see also *Faxon v. Hollis*, 13 Mass. Rep. 427; *Prince v. Smith*, 4 Mass. Rep. 455. The reception of evidence of this kind has always been considered as attended with much danger, which has led the courts to guard strictly against any further extension of the principle of the admissibility of such testimony.

Of what evidence. Entries made by the party himself are evidence to charge the defendant in two cases only, namely, where goods are sold and work done; *Wilmer et al. v. Israel*, 1 Browne, 257; *Prince v. Smith*, *supra*. The book of original entries of the plaintiff is admissible in a *scire facias* on a claim under the mechanics' lien law, to prove that the materials for which the suit was brought,

In the following case the principle seems to have been carried much farther. Upon an issue out of Chancery, to try whether

were furnished at and for the particular building which is the subject of the lien; *McMullen v. Gilbert*, 2 Whart. 237; see also *Linn v. Naglee*, 4 Whart. 92; *Church v. Davis*, 9 Watts, 304. The shop book of a tradesman is evidence to charge the *original debtor* only; it is not admissible against a defendant, who merely assumed to pay the debt of the person to whom the goods were sold; *Poultney et al. v. Ross*, 1 Dall. 238. In a suit between A. and B. the book of original entries of C. is not evidence to show a collateral fact, as that A. was charged by C. as a partner in a certain house; *Juniata Bank v. Brown*, 5 Serg. & Rawle, 226. Neither are such entries by a plaintiff evidence of the payment of money to third persons by the defendant's order, nor of such demands as in their nature afford a presumption that better evidence exists; *Prince v. Smith*, *supra*. But entries in a book of payments made for another, may be given in evidence, if accompanied by proof that the person had constant access to the books and assented to the entries; *Hines v. Barnitz*, 8 Watts, 39. And a book of original entries, verified on oath, is not competent evidence of the delivery of goods, under a previous contract for their delivery, at different distant periods; *Lonergan v. Whitehead*, 10 Watts, 249. So the book of original entries of a tradesman, is not evidence of the delivery of goods to be sold *on commission*, even though such book be offered not to charge the defendant, but as rebutting evidence to explain certain payments proved by the defendant; *Murphy v. Cross*, 2 Whart. 33. And it has been held in Massachusetts that the book of a party, containing his original minutes, is wholly incompetent to prove the payment of cash to third persons by order, and charges of rent; for better proof of such demands, if true, may be had; *Prince v. Smith*, *supra*. Entries in a book made or caused to be made by a father, of advancement to his children, are competent evidence, although the child charged had no knowledge of the entry; *Hengst's estate*, 6 Watts, 86. So an account-book, containing entries made by A. and B. are evidence of a partnership between them; *Champlin v. Tilley*, 3 Day, 303. When the defendant, a mortgagee, asserted that he had paid the debts of a mortgagor to a certain amount as the consideration of the mortgage deed; and the plaintiff resisted the claim and produced evidence to prove that large sums of money had been received by the defendant, which had not been credited to him, the plaintiff, or accounted for; but the defendant alleged that all such sums had been duly accounted for, by credits given in a settlement between him and the mortgagor, in proof of which he offered in court his books of account, purporting to be settled and signed by the parties; it was held that such books were admissible; *Cook v. Swan*, 5 Conn. R. 140; see also *Hutchinson v. Hosmer*, 2 Conn. Rep. 341. In Connecticut the law upon this subject seems to differ from that of every other State. Thus it has been there held that the admission of the parties to testify in an action of book debt, is founded on a supposed necessity; yet this necessity is not the necessity of the individual case on trial, but of the class of cases to which it belongs; *Peck v. Abbe*, 11 Conn. R. 207. And though the parties in book debt are not unlimited witnesses; yet the rule restricting their testimony to the quantity, quality and delivery of the articles charged, however plausible in theory has not been sanctioned by practice or established by precedent. If there be any general rule it is that where

eight shares of Hudson's Bay stock, bought in the name of Mr. *Lake*, were bought in trust for Sir *S. Evans*, his assigns, (the plain-

proper articles are charged in a book, the parties, *quoad* the book debt, are admissible like all other witnesses, to testify freely and fully in support or confutation of the account; *Id.* In an action of book debt brought by *A.* against *B.* and *C.* as partners, for goods delivered and charged to *B.*, *C.* denied the partnership; to prove which *A.* introduced a writing signed by *C.*, accompanied by proof that he frequented the shop and made entries in the books and that his name appeared on a sign in front of the shop. To disprove such partnership, *C.* then offered himself as a witness, to testify, that he was not a partner; that the writing was never delivered, but was obtained surreptitiously; and to explain why he frequented the shop and wrote in the books and suffered his name to appear upon the sign—and it was held that such testimony of *C.* was admissible, as going to disprove the plaintiff's account and the delivery of the goods to *C.*; *Id.* So also it has been decided in the same State that the shop-book of an insolvent debtor, who had assigned his property in trust for the benefit of his creditors, kept by one of the trustees, who was also a *cestui que trust*, is proper evidence, in an action brought by such trustee against a third person, in connection with other proof of a debt due from the assignor to the trustee and the state of the accounts between them; *De Forest v. Bacon*, 2 Conn. 633.

How proved. When a party would support his book account by his own oath, it seems that the oath must be administered in court, and that his testimony cannot be taken in the form of a deposition out of court; *Freep v. Basher et al.*, 2 Pick. 65. The absence of a witness from the State, so far as it affects the admissibility of secondary evidence, has the same effect as his death. The handwriting of a plaintiff who has made original entries of charge in a book, and who is absent from the State may be proved, and upon such proof the entries are admissible; *Alter v. Berghaus*, 8 Watts, 77. But an account purporting to be drawn out by the party himself from his original and daily minutes, is not admissible in evidence, although the book from which such statement might have been copied has been burnt or destroyed by accident; *Prince v. Smith, supra.* Though if in such case there be proof that the items of the account drawn out had actually existed in the party's book, where his daily transactions were minuted, and that the transcript had been truly taken therefrom, the transcript might be admitted upon the ground of necessity, and that it is the best evidence of which the case will admit under all the circumstances; *Ibid.* And when a party's own book, with his supplementary oath are competent evidence to prove the charges therein contained, secondary evidence of the contents is admissible, in case the books are lost or destroyed; *Holmes v. Marsden*, 12 Pick. 169.

Requisites to admissibility. 1st. Time when entries must have been made. The entries must be made at the delivery of the goods or immediately afterwards, and the object of the entry must have been to charge the other party; *Rhoads v. Gaul*, 4 Rawle, 404; *Curren v. Crawford*, 4 Serg. & R. 5; *Rogers v. Old*, 5 Id. 404; *Kaughley v. Brewster*, 16 Id. 133. Where a plaintiff made an entry of goods sold, upon a card with pen and ink, and the same evening or the next day transcribed it into a book, that is to be considered as the book of original entries of the plaintiff and may be read in evidence to the jury; *Patton v. Ryan*, 4

tiffs) showed, first, that there was no entry in the books of Mr. *Lake* relating to this transaction; secondly, that six of the receipts

Rawle, 408; see also *Ingraham v. Bockius*, 9 Serg. & R. 285. But entries made by a party on loose scraps of paper carried in his pocket for several days, without any reason given to account for the irregularity, cannot be received; *Vicary v. Moore*, 2 Watts R. 451; see also *Kessler v. McConachy*, 1 Rawle, 435. It is essential to this kind of evidence, that the charges appearing in the handwriting of the party, are in such a state that they may be presumed to have been his daily minutes of his business and transactions, in which regard is had to the degree of education of the party, the nature of his employment and the manner of his charges against other persons; *Prince v. Smith*, *supra*. Memoranda made upon a slate and transcribed into a book five or six days afterwards, are not such original entries as can be submitted to a jury as evidence. Nor will any prevailing custom make them evidence; *Forsyth v. Norcross*, 5 Watts, 432. Entries in a day-book, in order to their validity as evidence of a charge, must be made as to time in the ordinary course of the business in which he is engaged, who makes the charge. If they be delayed over one day, they are not legal evidence to charge a defendant, unless under peculiar circumstances; *Walter v. Bollman*, 8 Watts, 544. In an action by a blacksmith to recover a claim for work done, the plaintiff produced a book containing entries, some of which he swore were made by himself not later than the second day in the evening after the work was done, and were partly taken from a slate and partly from his own head. A witness was also produced, who testified that he made some of the entries by copying them from the plaintiff's slate on the evening of the day on which they were made or in the course of the next day: *Held*, that the book was admissible in evidence; *Hartley v. Brookes*, 6 Whart. 189; see also *Coggswell v. Dollion*, 2 Mass. R. 217.

2d. What is a book of original entries? A tradesman's book of accounts verified by his own oath, was received in evidence, although kept in the ledger form, and although it appeared from his own showing that he first made the charges upon a slate, and after transferring them to his book, rubbed them off the slate; *Faxon v. Hollis*, 13 Mass. R. 427. See also cases cited *supra*.

3d. Form and appearance of book. Shop-books verified by the oath of the party, though not kept regularly in the manner of a day-book, are competent evidence, with the supplementary oath of the party if living, to prove the items charged and the jury are to judge of their credit; *Coggswell v. Dullion*, *Faxon v. Hollis*, *supra*. But where a tradesman's day-book contains marks which show the items transferred to his ledger, the ledger must be produced that the other party may have advantage of any items entered therein to his credit; *Bince v. Swett*, 2 Mass. R. 569. But the court will not permit to go to the jury entries made on the first leaf of a tradesman's book before the first page; *Lynch v. McHugo*, 1 Bay's Rep. 33. A mutilated piece of paper, which appears to have been torn out of a book, in which neither the name of the plaintiff nor of the defendant appears, which contains no charges against the defendant, and which is unintelligible without explanation by the plaintiff, is not admissible in evidence as a book of original entries; *Hough v. Doyle*, 4 Rawle, 291. A book of entries manifestly erased and altered in a material point cannot be permitted to go to the jury as a book of original entries and ought to be rejected by the court unless the party offering it

were in the handwriting of Sir *S. Evans*, and there was a reference on the back of them by *Jeremy Thomas*, Sir *S. Evans*'s book-keeper, to the book *B. B.* of Sir *S. Evans*. *J. Thomas* was proved to be dead, and the Court of K. B., on a trial at bar, admitted the book so referred to, not only as to the six, but likewise as to the other two in the hands of Sir *Biby Lake*, the son of Mr. *Lake*.^a

*In the case of *Smartle v. Williams*, where the question was whether certain mortgage-money had really been paid, [495

^a B. N. P. 282. And here it may be remarked, that although the statute 7 Jac. I., c. 12, enacts that a shop-book shall not be evidence after the expiration of a year, it does not therefore make it evidence within the year, except under special circumstances (2 Salk. 690); and that in some cases it is evidence after the expiration of the year.

gives an explanation which does away with the presumption arising from its face; *Churchman v. Smith*, 6 Whart. 146; see also *Prince v. Smith*, *supra*. It is not a valid objection to the reception in evidence of original entries, that the book in which such entries are made contains other charges which are admitted not to be original; *Ives v. Niles*, 5 Watts, 323.

The book of original entries of a party claiming for goods sold or work or labour done, is not the best or only evidence of the claim; which may be proved *aliunde*; *Adams v. Col. Steamboat Co.*, 3 Whart. 75. When the plaintiff in an action of book debt for the purpose of discrediting the defendant's account, offered evidence to show that the defendant was generally reputed to keep inaccurate, false and fraudulent accounts, and that the defendant's books kept by him were generally reported to be inaccurate, false and fraudulent, and deficient in carefulness, integrity and truth: it was held that such evidence was inadmissible; *Roberts v. Elsworth*, 11 Conn. R. 290.

Sewall, J., in *Cogswell v. Dollion*, thus sums up the law upon the subject: "Books offered as evidence may be rejected by the court as incompetent or when admitted may be treated as unworthy of credit. I recollect but two cases of objections, which have been allowed against books as rendering them incompetent evidence. To be admitted in evidence they must appear to contain the first entries or charges by the party, made at or near the time of the transaction to be proved, and when the contrary is discoverable upon the face of the book or comes out upon the examination of the party, they ought to be rejected as incompetent evidence. Fraudulent appearances or circumstances such as material and gross alterations, false additions, &c., are also objections to the competency of the book in which they are discoverable or against which they may be proved in any manner. Objections to the credit of books admitted in evidence are of various kinds, which there is no occasion to enumerate. The method in which the book has been kept, as when the charges to be proved have been entered to a particular account like the entries of a ledger, and not like those of a day-book, is an objection to the credit of the book. The one method leaves a greater opening to fraud and falsehood than the other.

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a scrivener's book of accounts (the scrivener being dead) was held to be good evidence of payment.^b

So, in *Champneys v. Peck*,^c the plaintiff, in order to prove the delivery of his bill as an attorney, proved the death of *Dawling*, who had been his clerk, and produced the bill, with an indorsement on it in the handwriting of the deceased clerk, "March 4th, 1815, delivered a copy to Mr. *Peck*." The plaintiff further proved that the indorsement existed at the time when, according to its purport, the bill had been delivered; that it was the business of *Dawling* to deliver the bill; and that such an indorsement was usually made in the common course of business upon the copy kept. Lord Ellenborough held this to be *prima facie* evidence of the delivery of the bill, and the plaintiff had a verdict.^d Again, in *Doe dem. Patteshall v. Turford*,^e instructions having been given to an attorney, *B.*, to give the defendant notice to quit, he told his partner, who prepared three notices and three copies, and went out and returned in the evening, when he delivered to *B.* the three copies, on one of which, being the copy of that to defendant, was a memorandum by him that it had been served on defendant. It was *496] shown to be the invariable *practice of the clerks in this office, when they served notices to quit, to endorse a memorandum on the duplicate of the fact and time of service. After the partner's death this was admitted as evidence of the facts endorsed. So, in *Poole v. Dicus*,^f where a notary's clerk had at the time of presenting a bill, which was dishonored, made a memorandum in the notary's books, in the usual course of business, of such dishonour; it was held admissible after his death.

In *Chambers v. Bernasconi*,^g however, the action was brought by

^b B. N. P. 283; in this case it does not appear that the attorney had admitted the payment of the money by the entry in his book; but most probably such was the fact, and therefore this case would appear to be referable to the class of entries against interest, *supra*, p. 480.

^c 1 Stark. C. 404; E. C. L. R. 2. An agent employed to execute an order of removal, after returning from so doing, signed an indorsement on the order to the effect that he had executed it, and the court held, that, assuming such indorsement to be required and made in the usual discharge of the duty of removal, it was admissible to prove the execution; *R. v. Dukinfield*, 11 Q. B. 678; E. C. L. R. 63.

^d The cause was undefended. The ruling of Lord Ellenborough in this case has been questioned more than once, but seems to be now fully confirmed.

^e 3 B. & Ad. 890; E. C. L. R. 23.

^f 1 Bing. N. C. 649; E. C. L. R. 27. And see *Marks v. Lahee*, 3 Bing. N. C. 208; E. C. L. R. 32.

^g 1 C. & J. 451.

the plaintiff to try the validity of a commission of bankruptcy issued against him. He had been arrested on the 9th of November, 1825, and it was a question material to the act of bankruptcy, whether he had been arrested in South Molton Street, or at his cottage, Maida Hill, Paddington. In order to establish an act of bankruptcy by keeping a house, &c., at Paddington, the officer who arrested the plaintiff being dead, his follower was called, who swore that the arrest took place at Paddington. The plaintiff, to establish an arrest in South Molton Street, offered in evidence, from the files of the office of the under-sheriff of Middlesex, a paper annexed to the writ, signed by the deceased officer, and addressed to the under-sheriff of Middlesex, as follows:

“9th Nov. 1825. I arrested *H. Chambers* in South Molton Street, at the suit of *W. B.*”

By the course of office the officer was required, immediately after the arrest, and before taking a bail-bond, to transmit to the sheriff's office a memorandum, or certificate of the arrest; and for the last few years, (but not, as it seems, at the time of the arrest,) an account of the *place of arrest* had also been required from him. On such returns the officer and his sureties were charged by the sheriff, and returns were made upon them; the evidence was admitted, and the plaintiff had a verdict. Upon a *motion for a new trial it was contended, on the part of the plaintiff, that the [*497 document was admissible, as being a written declaration of a fact made by a person peculiarly cognizant of the fact, and against his interest. The Court of Exchequer held, that the evidence was inadmissible. Lord Lyndhurst, C. B., was of opinion that the principle contended for went beyond the former cases. Bayley, B., was of opinion that the instrument was not admissible in evidence at all, inasmuch as the entry could not be said to militate against the interest of the officer: and he also intimated his further opinion, that although the instrument was admissible, it would not be admissible to prove the circumstance of the place where the arrest occurred, as it was no part of the officer's duty to state the *place* where the caption took place. Upon a writ of error^h on a bill of exceptions afterwards tendered, the Court of Exchequer Chamber supported this view, and Lord Denman, C. J., in delivering the opinion of the court, said they were “all of opinion that whatever effect may be due to an entry made in the course of an office,

^h 1 C. M. & R. 347; and see *Lloyd v. Wait*, 1 Phill. 61.

reporting facts necessary to the performance of a *duty*, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." The ground, then, on which the evidence in this case was rejected, was, that the officer had gone beyond the sphere of his office, or at least that there was no *duty* cast on him of entering the *place* of arrest, and it was rejected simply upon that ground, leaving the general principle of the admissibility of entries in the course of duty untouched.ⁱ

In order to prove a lease of lands to *H.* and assignments by him to *P.*, and by *P.* to Sir *E. C.*, and that the land was parcel of a manor, an old book found in the muniment room of the party to whom the manor belonged was produced.* Amongst other
*498] entries and receipts in the writing of the then steward, this book contained an entry of the lease, which was an under-lease, reciting a lease from the lord, and a minute that "*H.*'s widow hath assigned to Sir *E. C.*, who yet claimeth ten years to come." The book was held not to be receivable in evidence, as there was no sufficient evidence that it was part of the *duty* of the steward to make an entry of the terms of such a lease.^k

The duty, it would also appear, must spring from some relation recognized by law. Thus, an entry in a book kept at the Great Synagogue of the Jews in London, made by the chief rabbi, in the course of his functions, of his having performed the rite of circumcision upon a child (which by the Jewish Law must be performed on the eighth day after birth,) was held by Lord Denham, C. J., after conference with Patteson, J., not to be receivable in evidence on an issue as to the age of the party.^l

And, as already suggested, the entry should be made contemporaneously by one cognizant of the facts, and who does not derive his information merely from third persons. Hence, where it was the duty of a workman in a coal pit to give notice to the foreman of all coal sold, and of the foreman to enter it in the books, but the foreman not being able to write, employed *B.* to make the entries for him by his direction, who every evening read the entries over to him; it was held that these entries, produced by *B.*, were not

ⁱ See *per* Tindal, C. J., and Park, J., *Poole v. Dicus*, 1 Bing. N. C. 649; E. C. L. R. 27; *De Rutzen v. Farr*, 4 Ad. & E. 53; E. C. L. R. 31.

^k *Doe dem. Padwick v. Skinner*, 3 Ex. 84; S. P. in error, 20 L. J. 297.

^l *Davis v. Lloyd*, 1 C. & K. 275; E. C. L. R. 47.

evidence, after the death of the workman and foreman, of the delivery of the coals.^m

Next, as to the proof of private documents. The proof of a deed, agreement, or other instrument is either, *First*, by witnesses; *Secondly*, by admission; or, *Thirdly*, by enrolment. If by witnesses, the instrument must be produced,^a *or be proved to have been *lost*, or destroyed, or to be legally unattainable,^o [*499 or in the possession of the adversary,^p or in the custody of the Court of Chancery,^q &c. If produced, it is either attested or not attested. If attested, the attesting witness must be called,^r or his absence must be accounted for,^s and his handwriting proved;^t or it must appear that the instrument is thirty years old,^u and came out of the proper custody.^v If it be not attested, the handwriting of the obligor should be proved.^w If it has been *lost*, or destroyed, or so situated that its production cannot be enforced, proof must be given of the fact,^x and that it was regularly stamped and executed,^y and then secondary evidence must be given of its contents.^z If it be in the adversary's possession, proof must be given of such possession, and of notice^a to produce it, and of its regular execution, (except in some particular instances,) and of its contents.^b

In order to prove a deed, agreement, or other private document,

^m *Brain v. Preece*, 11 M. & W. 773. The book was not signed by the workman, or shown to have been ever seen by him.

ⁿ *Infra*, p. 499, 500.

^o If the instrument be in the custody of a third person, its production is usually enforced by means of a writ of *subpœna duces tecum*. And in this case, of course, notice to the opposite party to produce will not entitle the other to give secondary evidence; *Whitford v. Tutin*, 10 Bing. 395, p. 369; E. C. L. R. 25. For the proceedings upon this writ see the title, *SUBPŒNA DUCES TECUM*.

^p In many instances the court will assist a party in obtaining an inspection or copy of the instrument, on motion. See 14 & 15 Vict. c. 90, and tit. *INSPECTION*.

^q Secondary evidence was held to be inadmissible of a letter filed in the Court of Chancery, it being in the power of either party to produce it on application to the court; *Williams v. Munnings*, Ry. & M. 18; E. C. L. R. 21. So, where a document had been deposited in Chancery, and an order made for delivering it to the party, it was held to be so far within his control that on his not producing it, secondary evidence might be given; *Rush v. Peacock*, 2 M. & Rob. 162.

^r *Infra*, p. 503, 504, *et seq.*

^s *Infra*, p. 512, *et seq.*

^t *Infra*, p. 521.

^u *Infra*, p. 529.

^v *Infra*, p. 541.

^w *Infra*, p. 561, 565.

^x *Infra*, p. 519.

^y *Infra*, p. 524.

^z *Infra*, p. 530.

^a *Infra*, p. 542.

^b *Infra*, p. 541, 576.

*500] it is necessary first to *produce* the deed, or to *excuse the omission by proof that it has been lost or destroyed, or is in the hands of the adversary, who has had notice to produce it: for the best evidence of the contents of a written instrument consists in the actual production of the instrument;^e and secondary evidence of it cannot be admitted, until the impossibility of producing it has been manifested to the Court.^d Where the deed has been pleaded with a profert, the production cannot be supplied by proof of the party's inability to produce the deed.^e

If, upon production of an instrument, any rasure or blemish appear upon its face, the party producing it ought to explain how
*501] the defect arose,^f and to show *that it was made before the execution, or that it was made after the delivery, by a stranger, if the rasure or interlineation has been made in an imma-

^e Printed copies of statements of annual accounts of a turnpike trust produced from the office of the clerk of the peace, (to which the originals signed by the chairman had been returned pursuant to 3 Geo. IV. c. 126, s. 78,) are not admissible in an action against the trustees, without showing the originals to have been lost or destroyed; *Pardoe v. Price*, 13 M. & W. 267.

^d In some cases, however, where the deed has been enrolled, an examined copy of the enrolment is evidence; see ENROLMENT. And a duplicate original is evidence, as in the case of an attorney's bill; *Anderson v. May*, 2 B. & P. 237; see also Vol. II. tit. NOTICE; *Jory v. Orchard*, 2 B. & P. 39. A bill of exchange must be produced in order to prove its identity with one admitted to have been received by the defendant, and paid into his banker's, although no other had been received by the banker; *Atkins v. Owen*, 2 Ad. & E. 35; E. C. L. R. 29.

^e *Smith v. Woodward*, 4 East, 585. In such case the party who has made the profert should move to amend before the trial; *Ibid.* It will be too late to make the application at Nisi Prius; 1 Stark. C. p. 74; E. C. L. R. 2. The counterpart will, however, suffice, if executed as alleged; *Pearse v. Morrice*, 3 B. & Ad. 396; E. C. L. R. 23; but see *Pitman v. Woodbury*, 3 Ex. 4.

^f *Henman v. Dickenson*, 5 Bing. 183; E. C. L. R. 15; B. N. P. 255; *Clifford v. Parker*, 2 M. & G. 909; E. C. L. R. 40. And where the alteration, *e. g.* on a bill, is evident, it has been held that it cannot be left to the jury upon bare inspection to say whether it was made before or after the bill was made; *Knight v. Clements*, 8 Ad. & E. 215; E. C. L. R. 35. These were all cases, it may be observed, of bills or notes. It has, however, been recently held by the Court of Q. B., that where erasures and interlineations appear upon a deed, the presumption is that they were made at the time of execution, for fraud is not to be presumed, and the judge is to leave it to the jury, upon the deed itself, whether they were then made or not; *Doe dem. Tatham v. Cattermore*, 20 L. J., Q. B. 364. But, in order to render explanation necessary, the fact of the instrument having been altered must in general be pleaded; see *Hemming v. Trenery*, 9 Ad. & E. 926; E. C. L. R. 36; and tit. BILL OF EXCHANGE—DEED—POLICY—WILL.

terial point.^g If the deed appear to be mutilated, it is *prima facie* evidence of cancellation;^h but proof may be given that the cancelling was by accident,ⁱ or that it was *effected by fraud and improper practice.^k If in the course of the inquiry the time of the delivery should become material, it should be proved by the attesting witness, if there be one, and if not, the date of the deed will be evidence of the time of delivery.^l If the erasure existed previously, the fact may be proved by any person who saw it; but the state of the deed at the time of its execution is best proved by an attesting witness, if he recollects it. Where a deed operates as to different parties from the time of execution by each, it will be binding on one who conveys by that deed, if complete as to him

^g A material alteration in an instrument, whether made by a party or a stranger, is fatal to its validity, and it cannot be enforced by action; but any estate conveyed by it is not affected, inasmuch as that passed at the time of execution, and cannot be affected by any thing subsequent; *Davidson v. Cooper*, 11 M. & W. 778; *Doe v. Bingham*, 4 B. & Ald. 672; E. C. L. R. 6; and therefore it may be given in evidence to prove a right created by its having been executed, or any collateral fact; *Agriculturist Cattle Insurance Company v. Fitzgerald*, 20 L. J., Q. B., 244. By agreement between the plaintiff and defendant, a house, therein mentioned as No. 38, was agreed to be let to the plaintiff, but the plaintiff entered and occupied No. 35, which was the house really meant, and the agreement after delivery was altered, it was not known by whom, by changing 38 to 35 on an erasure; it was held admissible to show the terms of the holding; *Hutchins v. Scott*, 2 M. & W. 809. So in *Lord Fulmouth v. Roberts*, 9 M. & W. 469, where the defendant held as tenant from year to year on the terms of an agreement as to tillage, &c., which, upon being produced, appeared originally to have contained a *habendum* for seven, which had been altered to fourteen years, the document was held admissible without explanation, as the alteration could not make the defendant hold according to the custom of the county, and the term was immaterial.

^h See as to the effect of cancellation, Vol. II. tit. DEED; *Doe v. Bingham*, 4 B. & Ald. 672; E. C. L. R. 6. The insertion by a stranger of "hundred" between "one" and "pounds" in the condition of a bond, consistent with the obvious sense, and which could not alter its operation, is immaterial; *Waugh v. Bussell*, 1 Mars. 311; 5 Taunt. 707; E. C. L. R. 1. *Semble*, that a letter, a considerable part of which appears obliterated, is not evidence; 1 Anst. 227; *Shep. Touch.* 68.

ⁱ *Palm.* 403; 1 Mod. 11; *R. v. Skibthwaite*. Certificate of 1774, from the parish chest, one of the names of the allowing justices was wanting; the certificate being in a torn and decayed state, the court held that the finding of the justices below of the due making of the certificate was conclusive of the fact; *Mich.* 1833. Or that it was done under a mistake; *Perrott v. Perrott*, 14 East, 423.

^k *Hetl.* 138, *Beckrow's case*.

^l *Sinclair v. Baggaley*, 4 M. & W. 312; *Anderson v. Weston*, 6 Bing. N. C. 296; E. C. L. R. 37; *Potez v. Glossop*, 2 Ex. 191. But see an exception where it is tendered as proof of the petitioning creditor's debt, in *Wright v. Lainson*, 2 M. & W. 743.

at the time, although it has been executed by another party at a time, when blanks were left which were immaterial to that party.^{m1}

^m A mortgagee conveyed to the mortgagor the legal estate, on being paid the mortgage-money, and the latter reconveyed to trustees to secure the payment of an annuity: at the time of execution by the mortgagee, the deed contained blanks for sums to be received by the mortgagor from the grantees of the annuity, and these were all filled up before the execution of the deed by the mortgagor, but several interlineations were made in that part of the deed after the execution by the mortgagee. It was held that the whole might be considered as one transaction, operating as to the different parties from the time of execution by each; and that the deed operated as a good conveyance of the estate from the mortgagor to the trustees; *Doe v. Bingham*, 4 B. & Ald. 672; E. C. L. R. 6; *Hall v. Chandless*, 4 Bing. 123; E. C. L. R. 13; and see *West v. Steward*, 14 M. & W. 47. Where a blank was left in a composition deed at the time of execution, in order to ascertain the amount, but filled up the next day and signed, a re-execution was presumed; *Hudson v. Revett*, 5 Bing. 368; E. C. L. R. 15; *Spicer v. Burgess*, 1 C. M. & R. 129; and see *West v. Steward*. But, in general, an instrument under seal containing blanks in a material point, which are afterwards filled up by a third person, even with the consent, though not under seal of the executing party, is wholly void, and can neither pass an interest, nor be enforced as a deed against him; *Hibblewhite v. McMorine*, 6 M. & W. 200.

¹ In *Prevost v. Gratz*, Peter's C. C. 369, and in *Morris v. Vanderen*, 1 Dall. 67, it was held that the legal presumption is, that an alteration or erasure in an instrument was made after its execution. In regard to negotiable paper it seems to be settled that an alteration apparent on the face of a bill or note is presumed to have been made subsequent to execution and delivery; *Hills v. Barnes*, 11 N. Hamp. 395; *Warren v. Layton*, 3 Harring. 404; *Simpson v. Stackhouse*, 9 Barr. 186; *Clark v. Eckstein*, 10 Harris, 507. Though there are cases which decide that the question is still one of fact to be left to the jury; *Crabtree v. Clark*, 7 Shepley, 337; *Davis v. Carlisle*, 6 Ala. 707; *Bank v. Lum*, 7 Howard Miss. 414; *Wilson v. Henderson*, 9 Smedes & Marshall, 375.

As to deeds and other papers there are cases both ways. That the party producing must explain what appears to be an erasure; *Herrick v. Malin*, 22 Wend. 388; *Tillon v. Ins. Co.*, 7 Barbour Sup. Ct. Rep. 564; *Acker v. Ledyard*, 8 ibid. 514; *Jordan v. Stewart*, 11 Harris, 244; *Burnham v. Ayer*, 35 N. Hamp. 351.

Contra, *Bliss v. McIntyre*, 18 Vermont, 466; *Matthews v. Coalter*, 9 Missouri, 705; *Beaman v. Russell*, 20 Vermont, 205; *Smith v. McGowan*, 3 Barbour Sup. Ct. Rep. 404; *Simpson v. Stackhouse*, 9 Barr. 186; *North River Meadow Co. v. Shrewsbury Church*, 2 N. Jersey, 424; *Wikoff's Appeal*, 3 Harris, 281; *Boothby v. Stanley*, 34 Maine, 115; *Printup v. Mitchell*, 17 Georgia, 558; *Reed v. Kemp*, 16 Illinois, 445; *Stoner v. Ellis*, 6 Ind. 152; *Maybee v. Sniffen*, 2 E. D. Smith, 1. Where an alteration is suspicious, and beneficial to the holder of the instrument, the party seeking to enforce it, is required to explain it, before he can recover; but where there is not the nature of the alteration, it will be presumed to have been made either before the execution of the paper or by the consent of the parties; *Huntington v. Finch*, 3 Ohio, (N. S.) 445.

*It should appear, on the production of the instrument, that it is properly stamped ;^a and where a stamp is required, [503 the objection for the want of one ought to be taken in that stage, and before the document is read. Although enrolment of the deed be essential, it is not incumbent on the party who relies on the deed to prove the enrolment; it lies on the party objecting to prove the negative.^o

The next step is to prove the legal requisites essential to the existence of the document as a deed, simple contract, bill of exchange, will, or other instrument.^p Circumstances necessary to make a document evidence must be proved *aliunde*, and not from the document itself. In order, for example, to make entries by a corporator evidence, it must be first shown by other evidence that he was a corporator.^q

If the deed or instrument produced purport^r to have *been [504 attested by one or more witnesses, whose names are subscribed,^u the party must call at least one of the witnesses; and in

^a See tit. STAMPS, and tit. BILLS OF EXCHANGE, &c. As to compelling the production of documents for the purpose of inspection, or of procuring them to be stamped, see Vol. II., tit. INSPECTION. The general rule is, that the court will not make such an order unless the applicant be either an actual party to the instrument or a party in interest; *Ibid.* Nor then where each has his own part. In an action between *A.* and *B.*, the court refused a rule to compel *B.* to produce, for the purpose of being stamped, an agreement between *B.* and *C.*, although it appeared by the affidavit of *C.* that the act complained of by *A.* arose out of this agreement; *Lawrence v. Hooker*, 5 Bing. 6; E. C. L. R. 15.

^o *Doe v. Bingham*, 4 B. & Ald. 672; E. C. L. R. 6.

^p In general, for the particular proof, see the title of the instrument itself.

^q *Davies v. Morgan*, 1 Cr. & J. 587. See *Banbury Peerage case*, 2 S. N. P. 763; *Adamthwaite v. Synge*, 1 Stark. C. 183; E. C. L. R. 2; *Freeman v. Phillips*, 4 M. & S. 486.

^r Where an agreement contained an attestation clause, and subjoined to it the name of a person as an attesting witness, but the name was written in pencil by one of the parties, and not by the supposed witness, it was considered that there was no *prima facie* evidence of any attestation, that it was unnecessary to call the supposed witness, and that the execution of the parties might be proved by other means; *Cussons v. Skinner*, 11 M. & W. 161.

^u Where the seal of the Bank of England had been affixed by a paper wafered to an indenture, on which paper was written, "Sealed by order of the Court of Directors of the Governor and Company of the Bank of England, 12th December, 1833. *A. B.*, Secretary," it was held that it did not appear that *A. B.* was an attesting witness. The statement was considered to be a mere memorandum that the party signing was the person deputed to affix the seal; *Doe d. Bank of England v. Chambers*, 4 Ad. & E. 412; E. C. L. R. 31. And where in compliance with a rule of the Court of Bankruptcy, an attorney has attested an insolvent's

cases where the instrument labours under any doubt or suspicion, he ought to call them all. The law requires the testimony of the subscribing witness, because the parties themselves, by selecting him as the witness, have mutually agreed to rest upon his testimony in proof of the execution of the instrument, and of the circumstances which then took place, and because he knows those facts which are probably unknown to others.* So rigid is this rule,⁷ that it has been held not to be superseded by a memorial of a purchase-deed, registered in Middlesex under 7 Anne, c. 20, even *505] against the *parties registering;⁸ nor in the case of an agreement to submit to arbitration, by a rule of court reciting it, made under 9 & 10 Will. III., c. 15, without calling the attesting witness;⁹ and it was formerly held not to be superseded in the case of a deed, by proof of any admission or acknowledgment of the execution by the party himself;¹⁰ whether the action was brought

petition for protection under 5 & 6 Vict. c. 116, and the Bankruptcy Court has acted upon it, he is not an attesting witness within the rule, so as to require him to be called to prove the petition; *Bailey v. Bidwell*, 13 M. & W. 73. But here the petition had been acted upon by the Court, was authenticated by its seal, and was used to prove the mere fact that a petition had been presented. If the schedule be used to show an admission by the insolvent, the attesting attorney must be called; *Streeter v. Bartlett*, 5 C. B. 562; E. C. L. R. 57.

⁷ *Doe v. Durnford*, 2 M. & S. 62; *R. v. Harringworth*, 4 M. & S. 350; *Grey v. Smythes*, Burr. 2275; *Breton v. Cope*, Peake, C. 30. The defendant would otherwise be deprived of the opportunity of cross-examining the witness as to the time of execution. *Per Ashhurst, J.*, in *Abbot v. Plumbe*, Doug. 215.

⁸ Formerly, (as has already been observed, *supra*,) it was the practice to try the existence of a disputed deed *per patriam et testes*; that is, the witnesses to the deed were sworn as part of the jury.

⁹ *Doe dem. Loscombe v. Clifford*, 2 C. & K. 448; E. C. L. R. 61.

¹⁰ *Berney v. Read*, 7 Q. B. 79, *ante*, p. 304; E. C. L. R. 53.

¹¹ *Abbot v. Plumbe*, Doug. 216. Although the acknowledgment be made in

² *Fox et al. v. Reil et al.*, 3 Johns. 477; *Clements & Co v. Eason et al.*, 1 Hayw. 18; *Johnson v. Knight*, 1 Cas. Law Rep. 93. *acc.* So in case of a receipt; *Pearl v. Allen*, 1 Tyler's Rep. 4. In New York it has been decided, in the case of a *promissory note*, that it may be proved by the maker's confession, without calling the subscribing witness; *Hall v. Phelps*, 2 Johns. 451.

In *Willoughby v. Carleton*, 9 Johns. 136, it was decided that a deed could not be proved by the grantee in an action to which he was not a party, without accounting for the absence of the subscribing witness, because the opposite party had a right to cross-examine him. That subscribing witnesses must be called, whatever be the instrument; see *Hagland v. Sebring*, 2 Southard's Rep. 103; *Williams v. Davis*, 1 Pennington Rep. 177; *January v. Goodman*, 1 Dallas, 208; *Hechert v. Haine*, 6 Binney, 16; even though the instrument be lost; *McMahan v. McGrady*, 5 Serg. & Rawle, 314.

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against the obligor himself, or against his assignees after his bankruptcy:^c nor by proof of any admission of the execution made by the defendant in his answer to a bill in equity.^d

But upon consideration the courts have held, that *admissions by a party bound, when used against himself, do not [*506 fall within the reason of the rule which forbids the reception of secondary evidence until the absence of primary evidence has been satisfactory accounted for. That reason is, that the introduction of secondary evidence when primary can be produced, the former being in its nature derived from the latter, necessarily raises a suspicion that the latter would have been unfavourable to the party who does not produce it. To what a party himself admits to be true, it is obvious that this reason does not apply;^e and, there-

court; *Johnson v. Mason*, 1 Esp. C. 89; *vide etiam*, *Laing v. Kaine*, 2 B. & P. 85. See the observations of Buller, J., on the case of *Abbot v. Plumbe*, 6 T. R. 367; and of Lord Ellenborough, *R. v. Harringworth*, 4 M. & S. 350; *Jones v. Brewer*, 4 Taunt. 46. The attesting witness must be called, although he be the real party in the cause; *Honeywood v. Peacock*, 3 Camp. 196. But payment of money into court on one of the breaches of covenant assigned, amounts to an admission of the deed, although *non est factum* has been pleaded; *Randall v. Lynch*, 2 Camp. 357. And admissions are binding which are made by a party or his attorney, with a view to the trial of the cause; therefore, if the deed be admitted on a summons and judge's order, proof of the execution of it will be dispensed with. Admissions thus made, or admissions agreed on between the parties for the purposes of the cause, are conclusive and irrevocable; *Wilkes v. Hopkins*, 1 C. B. 737; E. C. L. R. 50; *Langley v. Lord Oxford*, 1 M. & W. 508; *Elton v. Larkins*, 1 M. & Rob. 196; *Doe v. Bird*, 7 Car. & P. 6; E. C. L. R. 32. See tit. ADMISSIONS, *post*.

^c *Abbot v. Plumbe*, Doug. 215.

^d *Call v. Dunning*, 4 East, 53. See *Bowles v. Langworthy*, 5 T. R. 366; *R. v. Middlezoy*, 2 T. R. 41. The question arising whether the plaintiff in equity had demised certain tithes to a third party, the plaintiff admitted an exhibit, being a notice by him of such demise, and another exhibit as a true copy of the lease referred to in the notice: it was held in equity that the notice did not relieve the defendant from the necessity of calling the attesting witness, as the admission of the copy did not put the party in a better situation than if the original had been produced; *Mounsey v. Burnham*, 1 Hare, 15.

^e *Slatterlie v. Pooley*, 6 M. & W. 664; *Howard v. Smith*, 3 M. & G. 254; E. C. L. R. 42; *King v. Cole*, 2 Ex. 628; *Toll v. Lee*, 4 Ex. 230; *Murray v. Gregory*, 5 Ex. 468; and see Vol. II. tit. ADMISSIONS. Such admissions are evidence, though they relate to a deed which is produced, but is inadmissible because it is not properly stamped; *Slatterlie v. Pooley*. It does not, however, render the instrument itself admissible where the statement merely is as to its contents or operation; and the party using the admission cannot correct any erroneous version it may present, without calling the attesting witness, and putting in

fore, admissions made by a party are evidence against him of the contents of a document without producing it or calling the attesting witness.

Thus in *Boulter v. Peplow*,^f a memorandum signed by the plaintiffs, indorsed on a copy of the deed of settlement of a company, which was in the following terms, "We do hereby certify that the within-written deed is the *deed of settlement of the Uni-
*507] versal Gas-light Company, and that, to the best of our knowledge, the particulars therein contained are correctly set forth," was held to render the copy primary evidence against the plaintiffs of the contents of the deed. So the execution of a deed is sufficiently proved as against the assignor of it, by proof of the assignment by him containing a recital of it; as in an action against a sheriff for taking insufficient pledges in replevin, the assignment of the replevin bond by the sheriff being admitted, it was held unnecessary to call the attesting witness to the bond.^g

The general rule as to the necessity for producing the documents and proving it by the attesting witness applies whether the question be between the parties to the deed, or strangers;^h whether the deed be the foundation of the action, or but collateral;ⁱ or whether it still exist as a deed, or has been cancelled;^k and although the issue be directed by a Court of Equity to try the date, and not the existence of a deed.^l Upon an indictment against an apprentice for a fraudulent enlistment, it was held that the indentures must be proved in the regular way.^m And the same

the document; *Toll v. Lee*. And where an action was brought upon an agreement between the plaintiffs and the defendants, as modified by a memorandum of even date indorsed upon it, which memorandum expressly referred to it as the within-mentioned agreement; the plaintiffs at the trial duly proved the part of the memorandum executed by the defendants, and it was held on a bill of exceptions by the Ex. Ch. that they might then read the original agreement without calling the attesting witness. In this case the court considered the memorandum, not as an admission by the defendants of the agreement, but as itself an agreement incorporating the original one by reference; *Fishmongers' Comp. v. Dimsdale and others*, 6 C. B. 896; E. C. L. R. 60.

^f 19 L. J., C. P., 190; *Pritchard v. Bagshaw*, 20 L. J., C. P. 161.

^g *Plumer v. Brisco*, 11 Q. B. 46; E. C. L. R. 63.

^h 4 East, 53.

ⁱ *Manners v. Postan*, 4 Esp. 239.

^k *Breton v. Cope*, Peake, C. 30.

^l *Edinburgh v. Crudell*, 2 Stark. C. 284; E. C. L. R. 3.

^m *R. v. Jones*, E. P. C. 822; *R. v. Harringworth*, 4 M. & S. 350. So in arson, with intent to defraud the insurers, the policy must be produced and proved; *Doran's case*, 1 Esp. 127; *R. v. Gibson*, 1 Taunt. 98.

rule applies to all written agreements, and other instruments attested by a witness, as, for instance, a notice to quit in ejectment," in which case it was held, that proof of the notice upon the tenant, and that it was read over to him without his making any objection, was not sufficient.

Where the plaintiff avers that the defendant was bound *by an indenture, the fact may be proved by the production [508 and proof of the execution of the part executed by the defendant.*

Where the subscribing witness is called to prove the execution of the deed, the proof consists, First, of the sealing; Secondly, of the delivery. First, the sealing need not be with the seal of the obligor, and not have been actually made at the time; it is sufficient if the obligor acknowledge any impression already made to be his seal:^p and it seems that one piece of wax will suffice for several obligors, if they make distinct and several prints upon it.^q In *Lord Lovelace's case*,^r it was said that if one of the officers of the forest put one seal to the rolls by the assent of all the verderers and other officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all. And if one partner, in the presence of the other, seal and deliver a deed of sale for both, it is binding upon them both.^s Where a deed is executed under some special authority, which prescribes the mode and form of execution, the execution will not be valid unless those requisites be observed. Thus, where a certificate

ⁿ *Doe v. Durnford*, 2 M. & S. 62; *Stone v. Metcalf*, 1 Stark. C. 53; E. C. L. R. 2. See also *Higgs v. Dixon*, 2 Stark. C. 180, E. C. L. R. 3, where the same was held as to an attested warrant to distrain.

^o *Burleigh v. Stibbs*, 5 T. R. 465; *Roe v. Davis*, 7 East, 363; *Doe v. Pulman*, 3 Q. B. 622; E. C. L. R. 43. In an action by the lessor against the assignee of the lessee, the plaintiff having proved the execution of the counterpart, and that the original had been delivered over to the defendant, it was held that he was not bound to prove the execution of the original, which was produced by the defendant out of the hands of a third person, to whom he had assigned it over by a deed reciting the original lease; *Burnett v. Lynch*, 5 B. & C. 589; E. C. L. R. 11. It is not competent to a party, who has taken under a deed all the interest which it gives, to dispute its due execution; *Ibid.*; *Doe v. Wainwright*, 5 Ad. & E. 520; E. C. L. R. 31. But see *Pitman v. Woodbury*, 3 Ex. 4.

^p Com. Dig. tit. Fait.

^q Shep. Touchst. 57; Perkins, c. 2, s. 134.

^r Sir W. Jones, 268.

^s *Ball v. Dunsterville*, 4 T. R. 313; *Cooch v. Goodman*, 2 Q. B. 580; E. C. L. R. 42; but see *Harrison v. Jackson*, 7 T. R. 207.

under the statute 8 & 9 Will. III., c. 30 (which require certificates *509] to be *under the hands and seals of the churchwardens and overseers, or the major part of them, or under the hands and seals of the overseers, where there are no churchwardens,) was signed by two churchwardens and one overseer, but bore two seals only, the court held that it was not a valid certificate. They said that it was the case of an execution of a power, and that in the execution of powers all the circumstances required by the creators of the power, however unessential and otherwise unimportant, must be observed, and can only be satisfied by a strictly literal and precise performance.^t

In the case of *Adam v. Kerr*,^u on an action on a bond alleged to have been sealed, evidence was admitted to prove a custom in Jamaica (where the bond in question had been executed) by substituting a mark with a pen for a seal. The Court of Common Pleas, after a verdict for the plaintiff, subject to the opinion of the court, granted a rule *nisi* to set aside the verdict and enter a nonsuit, but no decision was given.¹ Proof of the delivery of a sealed instru-

^t *Rex v. Austrey*, Easter Term, 1817. *Hawkins v. Kemp*, 3 East, 410. See tit. POWER, and Sir E. Sugden's Treatise on Powers, where the whole subject of Powers is most skilfully treated.

^u 1 B. & P. 360.

¹ In Pennsylvania and Virginia a written or ink seal or scrawl is sufficient; *McDill's Lessee v. McDill*, 1 Dall. 63; *Long v. Ramsay*, 1 Serg. & Rawle, 72; *Jones et al. v. Logwood*, 1 Wash. 42. But in the latter State there must be some expression in the body of the instrument to show that it was the intention of the parties to give it the effect of a sealed instrument; *Baird v. Blaignrove*, 1 Wash. 170; *Austin's adm. v. Whitlock's exors.*, 1 Munf. 487; *Anderson v. Bullock et al.*, 4 Munf. 442. Aliter semble in Pennsylvania; *Taylor et al. v. Glazer*, 2 Serg. & Rawle, 504.

In the case of the *United States v. Coffin*, it was held in the District Court of South Carolina that a mark made with ink, in the form of a seal, was sufficient to create a specialty, if acknowledged by the maker as his seal; Bee's Rep. 140.

In New Jersey, it has been decided that a written scrawl is not good as a seal, except upon instruments for the payment of money; *Overseers of Hopewell v. Overseers of Amwell*, 1 Halstead's Rep. 169; see *Newbold's exor. v. Lamb*, 2 Southard's Rep. 449.

In *Warren v. Lynch*, 5 Johns. 239, the Supreme Court of New York held that a scrawl with a pen of L. S. at the end of a name is not a seal—that a seal is an impression upon wax or wafer or some other tenacious substance capable of being impressed—and that although a scrawl might be considered a seal and render an instrument a specialty, in the place where it was executed, yet when sued in New York, it must be treated as a simple contract and declared upon accordingly.

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ment will be evidence that the party adopts and acknowledges the seal to be his; and proof that he wrote his name opposite to the seal affords presumptive evidence of the sealing and delivery of a deed in which it was affirmed that he sealed it.^x

Where a party to a deed has acted under it for some time, and it is produced from his custody, its execution by him may be presumed against him, although there be a seal only, and no signature or attestation.^y

No particular form of delivery is requisite; it is sufficient if the obligor, by any act, indicate his intention to put the deed into the possession of the other party, as by *throwing it down upon [510 the table for the other to take it up. So if a stranger deliver it with the assent of a party to the deed.^z If the deed be made by a corporate body, it is sufficient to prove that it was sealed by the corporate seal or any other which was used for the occasion, without proving a delivery of the deed.^a But if the corporation, by their letter of attorney, have appointed an agent to deliver the deed, it is not their deed till delivery.^{b1}

^x *Talbot v. Hodson*, 7 Taunt. 251; E. C. L. R. 2.

^y *Cherry v. Heming*, 4 Ex. 633, note; 5 Bing. 368; E. C. L. R. 15.

^z Com. Dig. Fait, A. 3; Co. Litt. 36, a.; *Thoroughgood's case*, 9 Rep. 137, a.; *Murray v. Earl of Stair*, 2 B. & C. 82; E. C. L. R. 9. A boy and his father went to execute an apprentice-deed, binding the son: they desired a person to write their names opposite to two seals, which was done; they took the instrument to the master, and left it with him. This was held to be a sufficient execution; *R. v. Longnor, Inhab.* 1 N. & M. 576; E. C. L. R. 28; 4 B. & Ad. 647; E. C. L. R. 24. A deed between two parties purported to be under their hands and seals. The signing and sealing by both were attested. The deed was in the hands of the plaintiff, who sued the defendant on it in an action of assumpsit, and both parties had admitted that it was signed, sealed, and executed as it purported to be. The court held, that it must be presumed to have been delivered, being produced by the plaintiff, and therefore did not support the action of assumpsit; *Hall v. Bainbridge*, 12 Q. B. 699; E. C. L. R. 64.

^a Perk. c. 2, s. 132. The name used must be the same in substance with the true name, but need not be the same in words and syllables; *Mayor and Burgesses of Lynn*, 10 Coke, 124; *Croydon Hospital v. Farley*, 6 Taunt. 467; E. C. L. R. 1; and 4 B. & Ad. 650; E. C. L. R. 24.

^b Co. Litt. 36, a., note 5.

¹ One of the subscribing witnesses to a deed did not recollect that it was delivered, but was sure that he should not have attested it, unless he had seen the grantor sign and seal it or heard him acknowledge that he had done so; another did not recollect the delivery but was sure that he should not have attested it, unless he had heard him acknowledge it as his act and deed for the purposes therein mentioned, as it was his constant custom to require his acknowledgment.

Although a party is under the necessity of calling the subscribing witness,^c he is not concluded by the testimony of that witness,

^c *Jones v. Brewer*, 4 Taunt. 46.

The third was out of the country and the fourth interested, but their handwriting proved; held a sufficient attestation of the deed; *Currie v. Donald*, 2 Wash. 58. The execution of a sealed instrument is sufficiently proved by the production of the subscribing witnesses, who recognize their signatures and remember the transaction, though neither remembers the fact of formal delivery; *Miller's estate*, 3 Rawle, 312. If the subscribing witnesses are unable to recollect material circumstances, the testimony of another person who was present at the time is admissible to establish these facts. *Ibid.* And where the witness to an instrument offered in evidence by the defendant had become special bail for the defendant, it was held that the handwriting of the parties to the instrument and witness might be proved; *Bell v. Cowgill*, 1 Ashmead, 8. If a witness become interested in the destruction of an instrument of writing after its execution, evidence of his handwriting will be received; *Allen v. Allen*, 2 Tenn. Rep. 172. G.

The subscribing witness to an agreement stated that he was called into the room to sign the paper as a witness, but did not see the parties execute it, or acknowledge they had done so, but they told him it was their agreement; this was held sufficient; *Munns v. Dupont*, 3 Wash. C. C. Rep. 42. So where one testified that he was called into a room to witness the execution of articles of agreement for the sale of lands; that he did not see the vendor sign, seal or deliver the papers but he saw the money paid, and knew the handwriting to be that of the vendor; it was held (one judge dissenting) that this was sufficient proof to let the instrument go to the jury; *Lesher's Lessee v. Levan*, 2 Dallas. So in *Piggott v. Hal- loway*, 1 Binney, 436, a warrant of attorney was permitted to go to the jury, upon a subscribing witness testifying, that on a reference to his minutes he found he was present at a certain place on the day of the date of the warrant; that his name as attesting witness was in his own handwriting; that the defeasance to warrant was also in his own handwriting; and that the impression of the seal appeared to be taken from an engraving he then and still had; and that *from all these circumstances*, he was convinced that he was present and witnessed the execution of the instrument.

In an action on a sealed bill, proof by the subscribing witness that he saw the defendant sign his name to it, and heard him admit that it was his signature, but did not hear him acknowledge that it was his seal, nor see him deliver it, was held sufficient to go to the jury; *Curtis v. Hall*, 1 Southard's Rep. 148; see *Berks and Dauphin Turnpike Co. v. Myers*, 6 Serg. & Rawle, 12; *Sigfried v. Leown*, *Id.* 308; *Crawford v. The State*, 6 Har. & Johns. 231.

In *Churchill v. Speight's Exors.*, 2 Hayw. 338, where in an action on a *single bill*, the subscribing witness swore that his name was in his handwriting, and that he attested a note from A. to B. who assigned it to plaintiff, and that he attested no other; that he did not believe the signature to the note to be in A.'s handwriting, and that he did not remember that there was a seal to it—it was left to the jury to determine whether the evidence was sufficient. In South Carolina, it is held that it is not necessary that a subscribing witness should recollect the time and occasion when he subscribed the instrument, if he recognizes his handwriting and is assured in his own mind that he never subscribed an instrument without

if he cannot, or will not declare the truth. If the witness refuses to testify,^d the attestation may be proved by another witness.^e Where one of the witnesses to a will would not swear to the sealing and publication, Holt, C. J., held that it was sufficient to prove the attestation of the witness.^f If the witness admit *his signature as attesting witness, but prove that he did not in fact see the instrument executed, proof of the handwriting of the obligor will be sufficient.^g If the witness actually deny the due execution of the instrument, other witnesses may be called to contradict him; and circumstantial evidence is admissible to prove the contrary.^{h1} So a will may be proved by the evidence of one wit-

^d *R. v. Harringworth*, 4 M. & S. 350; *Talbot v. Hodson*, 7 Taunt. 251; E. C. L. R. 2.

^e *Per* Lord Mansfield, Burr. 2224, 2225, where two of the witnesses to a will denied their handwriting, and it was proved by the third.

^f *Dayrell v. Glasscock*, Skin. 413. In many cases the witness is unable from his memory to speak to the fact of execution; if, however, he says that from seeing his signature he is sure he saw the party execute, this is enough; *Maugham v. Hubbard*, 8 B. & C. 14; E. C. L. R. 15; *Bringloe v. Goodson*, 5 Bing. N. C. 738; E. C. L. R. 35; *R. v. St. Martin, Leicester*, 2 Ad. & E. 210; E. C. L. R. 29.

^g *Grellier v. Neale*, Peake's C. 146, *i. e.* if no other attesting witness appear on the instrument; and see *Talbot v. Hodson*, 7 Taunt. 251; E. C. L. R. 2; *Burrows v. Lock*, 10 Ves. 474; *Lemon v. Dean*, 2 Camp. C. 636; *Fitzgerald v. Elsee*, 2 Camp. C. 635; *Ley v. Ballard*, 3 Esp. C. 173. n.; *contra*, *Phipps v. Parker*, 1 Camp. 412; *Boxer v. Rabeth*, 1 Gow. 175.

^h And. 224, *per* Lord Mansfield, Doug. 206. A will of lands made before 7 Will. IV. & 1 Vict. c. 26, was attested by three witnesses, one being a marksman; a person of the same name and supposed to be this witness, who was very old and had known the testator, recollected nothing of the transaction; and the other two being dead their handwriting was proved. The will had been uncontested for sixteen years. It was held that the jury might presume the due execution, although there was no other proof of the devisors handwriting or authority. *Doe dem. Davies v. Davies*, 9 Q. B. 648; E. C. L. R. 58.

having seen it duly executed or acknowledged; *Pearson v. Wightman*, 1 Rep. Con. Ct. 344. So in New Jersey, *Denn v. Mason*, 1 Cox's Rep. 10. So in Virginia, *Currie v. Donald*, 2 Wash. 58. M.

¹ Where a subscribing witness denies his signature, other witnesses may be called to prove the execution of the instrument; *Ducknall v. Weaver*, 2 Ohio R. 13. So also if he refuses to attend, under circumstances of fraud, and the party has done all he can to procure his attendance; *Baker v. Blount*, 2 Hayw. 404. G.

Where a subscribing witness to a deed does not remember its execution, but states that his signature is genuine and that it would not have been placed there unless he had been called to witness it, this evidence is sufficient to render the

ness, although two of the attesting witnesses swear that the testator was incompetent.¹ And where two witnesses to a will of lands swore that the testator did not publish the will, and was incapable of doing so, the court, upon a trial at bar, admitted witnesses to contradict them.* In the celebrated case of *Lowe v. Jolliffe*,¹ the three subscribing witnesses to the testator's will, and the two surviving ones to a codicil made four years subsequent to the will, all swore that he was incapable of making a will at the time of the will and codicil, or at any intermediate time; and *yet the
 *512] will was established upon the testimony of other witnesses.¹

Declarations by a deceased attesting witness that he forged the

¹ *Hudson's case*, Skin. 79.

* And committed the two witnesses for perjury, taking security from the plaintiff to prosecute them; *Hudson's case*, Skin. 79.

¹ 1 Bla. 365; and see *Pike v. Badmering*, Str. 1096.

deed admissible; *Graham v. Lockhart*, 8 Ala. 9; *Hemphill v. Dixon*, 1 Hempstead, 235.

A subscribing witness testified to his own signature to a mortgage, and that it was signed and acknowledged by a person who was introduced to him as the mortgagor. Another witness identified the signature thus made as that of the mortgagor. Held that the mortgage was sufficiently proved; *Goodhue v. Berrien*, 2 Sandf. Ch. R. 630. Proof by the subscribing witness that he saw the party deliver an instrument, already signed and sealed by him, is sufficient; *Higgins v. Bogan*, 4 Harrington, 330. The identity of the grantor in a deed, will be presumed from proof of the execution of the instrument by one of the same name even though it appear that there are many others of that name; *Flournoy v. Warden*, 17 Missouri, 435.

The testimony of one whose name appears as a subscribing witness to a deed, executed about twelve years previously, that he had no recollection of ever having seen and attested the deed, and believes he never did, is not sufficient to show the instrument to be spurious, in opposition to one witness who testifies to its execution by the parties, and of others who state corroborating facts; *Juzan v. Toulmin*, 9 Alabama, 663; *Hale v. Stone*, 14 Ibid. 803.

¹ That the subscribing witnesses or one of them, if competent, alive and within the jurisdiction of the court must be produced; see *Sheets v. Dufour*, 5 Blackf. 549; *Trammell v. Roberts*, 1 McMullan, 305; *Brock v. Saxton*, 5 Pike, 708; *Handy v. The State*, 7 Har. & Johns. 42; *Sampson v. Grimes*, 7 Blackf. 176; *Woodman v. Segar*, 25 Maine, 90; *Mariner v. Saunders*, 5 Gilman, 113; *Edwards v. Sullivan*, 8 Iredell, 302; *Spencer v. Bedford*, 4 Strobhart, 96; and that he may be contradicted and discredited by the party calling him; *Smith v. Asbell*, 2 Strobhart, 141. If he forgets or denies his attestation, other evidence of its execution may be resorted to; *Reinhart v. Miller*, 22 Georgia, 402. Where names of persons are found on a deed in the usual place for subscribing witnesses, and they are not parties to the deed, they will be presumed to be witnesses to the instrument, though they are not stated to be such; and therefore where such a

instrument, or has fraudulently altered it, are inadmissible.^m But where some of the witnesses are dead, and the survivor charges them with fraud in the attestation, evidence of their good character may be given to support the will.ⁿ

Where the instrument purports to have been attested by a witness, the party on whom the proof of the instrument lies must, unless the instrument appear to be thirty years old, (when it is to be inferred that the witnesses are dead,) either call an attesting witness, or show that the usual proof by means of the attesting witness has become impossible. For this purpose he may prove that the attesting witness is dead,^o has become blind,^p or insane.^q Previous to the recent Acts, he might have proved that the wit-

^m Where there were two attesting witnesses and one denied all recollection of having attested the deed, and doubted the genuineness of his own and the defendant's signatures, and the other witness being dead, his signature and that of the defendant were proved by other witnesses, declarations of the deceased witness that he had fraudulently altered the deed were held not admissible; *Stobart v. Dryden*, 1 M. & W. 615; and see *Sussex Peerage case*, 11 Cl. & F. 85.

ⁿ *Provis v. Reed*, 5 Bing. 435; E. C. L. R. 15; *Doe dem. Walker v. Stephenson*, 3 Esp. 284.

^o *Barnes v. Trompowski*, 7 T. R. 266. It seems that the ordinary presumption as to the death of any party would be acted upon. See Vol. II., tit. DEATH—PEDIGREE.

^q *Wood v. Drury*, Ld. Raym. 734; 12 Vin. Abr. T. b. 48, pl. 12; *Pedler v. Paige*, 1 M. & Rob. 258. But in *Crank v. Frith*, 2 M. & Rob. 262, Lord Abinger held that he ought to be called, in order to learn whether anything material passed at the execution.

^q *Bernett v. Taylor*, 9 Ves. 381; *Currie v. Child*, 3 Camp. 283. But inasmuch as an insane person may be a witness, unless he is so devoid of understanding as to be unable to testify; *R. v. Hill*, 20 L. J., M. C. 222; it would appear that he ought to be called and that fact ascertained by questioning him, or that fact should be proved by other competent evidence.

deed is to be proved, they must be produced or their absence legally accounted for; *Chaplain v. Briscoe*, 11 Smedes & Marshall, 372.

The testimony of one of the subscribing witnesses to a deed is sufficient to prove its execution, unless the judge in his discretion requires the production of the others; *Burke v. Miller*, 7 Cushing, 547; *White v. Wood*, 8 Ibid. 413. So proof of the handwriting of one witness is sufficient; *Burnett v. Thompson*, 13 Iredell, 379.

The acknowledgment by the party himself that he executed the deed or even his admission in answer to a bill filed for discovery has been held not to dispense with the testimony of the subscribing witnesses; *Ellis v. Smith*, 10 Georgia, 253.

Where the name of a witness was subscribed by another without his knowledge or assent, the party is allowed to prove it, and the instrument is treated like not subscribed; *Handy v. The State*, 7 Har. & J. 42.

*513] ness was interested at the time of the attestation, *which was therefore a nullity;^a or, that he had since the attestation become so interested,^a as where he had become the administrator of the obligee,^b even though he disqualified himself voluntarily by taking out administration.^{a1} But since the recent changes all these persons are made competent witnesses. He might also prove that the witness had married the person to whom the instrument was given;^a and he may still prove that the witness is abroad and beyond the process of the court, whether he be domiciled there or not,^a

^a *Swire v. Bell*, 5 T. R. 371. But if a party, knowing that a witness was interested, requested him to attest the instrument, he could not afterwards insist upon the objection; *Honeywood v. Peacock*, 3 Camp. 196; See stat. 6 & 7 Vict. c. 85. The attesting witness to a will is competent, although he be named a devisee or legatee therein. 7 Will. IV. & 1 Vict. c. 26.

^a *Swire v. Bell*, 5 T. R. 371. See also *Goss v. Tracy*, 1 P. W. 287; *Buckley v. Smith*, 2 Esp. C. 697; *Godfrey v. Norris*, 1 Str. 34; *Honeywood v. Peacock*, 3 Camp. 196. Where the plaintiff in an action on a charter-party had communicated an interest to a witness to the charter-party after the execution of the instrument, it was held that evidence of his handwriting was inadmissible. *Hovill v. Stephenson*, 5 Bing. 493; E. C. L. R. 15.

^a *Godfrey v. Norris*, 1 Str. 34.

^a Str. 34; 5 T. R. 371, *supra*.

^a *Buckley v. Smith*, 2 Esp. C. 697. The majority of the Judges seem to be of opinion that a wife, if objected to, cannot under 14 & 15 Vict. c. 99, be a witness for or against her husband in an action brought by or against him; *per* Jervis, C. J., and Pollock, C. B., Westminster, November 27th. If she were a party to the suit she clearly would be admissible. It may be observed, too, that if the wife be inadmissible the husband would likewise be so, if the action were brought by or against the wife, and he were not a party.

^a *Prince v. Blackburn*, 2 East, 250; *Coghlan v. Williamson*, Doug. 93; *Holmes v. Pontin*, Peake's C. 99; *Adam v. Kerr*, 1 B. & P. 360; *Wallis v. Delancey*, 7 T. R. 266; *Ward v. Wells*, 1 Taunt. 461; *Hodnett v. Forman*, 1 Stark. C. 90;

¹ So when the witness was, at the time of the attestation, the wife of the obligor; *Nelins v. Brickell*, 1 Hayw. 19; and where the witness's name was written by the obligor in his absence, he not having been present at the execution of the bond; *Allen v. Martin*, 1 Cas. Law Rep. 373. Evidence of the handwriting of the obligor is to be given. So if the handwriting of the subscribing witness cannot be proved; *Jones v. Blount*, 1 Hayw. 238; *Clerk v. Sanderson*, 3 Binney, 192; *Duncan v. Beard*, 2 Nott & McCord, 400. Or if there be no subscribing witness; *Ingram v. Hall*, Martin, 1; S. C. Hayw. 193; *Long v. Ramsay*, 1 Serg. & Rawle, 72. Or be erased by a stranger; *Wicke's Lessee v. Caulk*, 5 Har. & Johns. 36. M.

If a subscribing witness to a deed voluntarily incapacitates himself to testify to its execution, by becoming interested therein, such deed can not be proved by other evidence; *McKinley v. Irvine*, 13 Alabama, 681.

as in *Ireland.* That he has kept out of the way at the instance of the adversary or party charged in the suit:^a or [*514 that the witness cannot be found after diligent inquiry made.^b

The nature of this inquiry may be collected from the following cases. There were two witnesses to a bond which had been executed in America: it was proved that *Rivington*, one of the witnesses, was in America; and to show that *William Moreton*, the other witness, was also abroad, *it was proved that a man of the name of *Moreton* had lived with *Rivington*, but it could [*515 not be proved that his name was *William*, or that at the time of trial he was not in England; the handwriting of the other witness was proved, and Lord Kenyon held that it was reasonable evidence

E. C. L. R. 2. That he went abroad two years ago, and has not been heard of since, *Doe v. Paul*, 3 C. & P. 613; E. C. L. R. 14. One of two subscribing witnesses was dead, and the other had gone abroad twenty years before the trial, and the witness who proved the latter fact, stated that he had not heard anything of him since, but that he had applied to his brother, who informed him that he did not know where he was, whether in England or abroad. The Court held, that proof of his handwriting ought to have been admitted; and Lord Ellenborough observed, that proof of the fact of the subscribing witness's going abroad twenty years ago (so large a portion of a man's life), and never having been heard of since, was of itself sufficient; *Doe d. Johnson v. Johnson*, K. B. Trin. T. 1818. In *Doe d. Powell*, 7 C. & P. 617; E. C. L. R. 32; it was proposed to show that a subscribing witness had stated where he resided; and further, to show, that upon inquiry made at that place, the answer was that he had gone to America, and then to prove in substance that some seafaring men had said that they had seen the witness in America, but the evidence was rejected. But see *infra*, note (m), and the cases as to the evidence of the absence of a witness, in order to admit his deposition or examination under a commission, *ante*, pp. 412, 429

^a *Hodnett v. Forman*, 1 Stark. C. 90; E. C. L. R. 2; though he might have been examined upon interrogatories; *Glubb v. Edwards*, 2 M. & Rob. 300.

^b *Pytt v. Griffith*, 6 Moore, 538; E. C. L. R. 17, *Burt v. Walker*, *Spooner v. Payne*, *infra*. In case of evidence of inquiries made after an attesting witness, answers made even by strangers to inquiries duly prosecuted, seem in general to be admissible to show that further inquiry would be hopeless, or that such further inquiry has been made as such answers warrant without success. Declarations made by the attesting witness previous to his departure, or letters from him since his departure, tending to show that inquiry has been properly made, or the impossibility of procuring the attendance of the witness appear also to be admissible. The evidence in such case is offered to the Judge, not to the jury; *Burt v. Walker*, *infra*; *Wyatt v. Bateman*, 7 Car. & P. 586; E. C. L. R. 32.

^c *Cunliffe v. Sefton*, 2 East, 183; and see *Crosby v. Percy*, 1 Taunt. 365; *Parker v. Hoskins*, 2 Taunt. 223. In the case of a warrant of attorney, to dispense with the deposition of the attesting witness, the nature of the search, where he had been last seen or known to reside, and when he was last heard of, must be stated; *Waring v. Bowles*, 4 Taunt. 132.

to go to a jury.^c The clerk of the defendant was the subscribing witness to a bond, and when he was subpoenaed, said that he would not attend, and the trial had been put off twice in consequence of his absence: search had also been made at the defendant's house and in the neighbourhood, and upon receiving information at the defendant's that the witness was gone to Margate, inquiry was there made without success; it was held, that under these circumstances, evidence of his handwriting was admissible.^d Where an attorney's clerk was attesting witness, and his master could give no account of him, although at the trial he recollected where he might probably be found, proof of his handwriting was admitted.^e The attesting witness to a deed was the son of the defendant, and a student at St. George's Hospital, where he was in the habit of attending lectures. Inquiries were made for him there by a person who waited for him several hours on seven different occasions; inquiries were also made for him at several places where he had resided, and repeatedly at his father's house, where a *subpoena* had been shown to his mother and brother, but no information could be obtained from them. The defendant had also been summoned to admit the execution, or declare where the witness was, but this was refused, and the summons was indorsed by the judge; "No order, the defendant refusing to give the information." Upon this evidence the court held that the instrument was properly received.

*on proof of his handwriting.^f After inquiry at the several
*516] places of residence of the obligor and obligee, where no intelligence could be procured as to the witness, whom nobody knew, secondary evidence was held to be admissible.^g And it was held that it was unnecessary in such a case to advertise for the witness in the public newspapers,^h inquiry having been made at the only places where it was likely that the witness would be met with or heard of. Where the attesting witness had left his office of business in London twelve months before, but no inquiry had been made at the house at Sydenham, where he had resided with his family, the evidence was held to be insufficient;ⁱ but on proof

^c *Wallis v. Delancey*, 7 T. R. 266.

^d *Burt v. Walker*, 4 B. & Ald. 697; E. C. L. R. 6. And see *Wyatt v. Bateman*, 7 Car. & P. 586; E. C. L. R. 32.

^e *Miller v. Miller*, 2 Bing. N. C. 76; E. C. L. R. 29.

^f *Spooner v. Payne*, 4 C. B. 328; E. C. L. R. 56.

^g *Cunliffe v. Sefton*, 2 East, 183.

^h 2 East, 183.

ⁱ *Wardle v. Fermor*, 2 Camp. 282. And Lord Ellenborough in that case observed that the proof of search ought to be watched very narrowly. Where it

being given that a commission of bankruptcy had been sued out against the witness a year before, to which he had not appeared, Lord Ellenborough said that he would presume that he was out of the kingdom, and that if he had been at Sydenham he would have surrendered to save himself from a capital felony.^k Where inquiry had been made after the witness at the Admiralty, and it appeared from the last report that he was serving on board some ship, but it did not appear what ship, it was held to be sufficient.^l So it was where inquiry had been made at the last place of residence of the witness, and the answer from his father was, that he had absconded to avoid his creditors, and was not to be found.^m In another case the testimony of a subscribing witness was dispensed with on evidence given that the witness had expressed his intention to leave the country, stating that he had reason for doing so, in order to avoid a criminal charge, and that his relations had not seen him after his expression of such intention.ⁿ And where an agreement of letting was attested by the landlord's steward, who had been apprehended for felony and had absconded, and could not be found after search at his house, and at another house which he was in the habit of frequenting, evidence of his handwriting was admitted.^o A fortnight before the trial

was proved that the attesting witness to an agreement had been inquired after by a person who knew him, but who had not seen him for eighteen months, at coffee-houses and other places where he thought he might hear of him, at the request of the plaintiff's attorney, and without success, it was held that proof of the handwriting was admissible, without proof that inquiry had been made of the parties to the suit who had executed the agreement; *Evans v. Curtis*, 2 C. & P. 296; E. C. L. R. 12.

^k 2 Camp. 282; *supra*.

^l *Parker v. Hoskins*, 2 Taunt. 223.

^m *Crosby v. Percy*, 1 Taunt. 365. Where the father of the witness proved his having enlisted in a regiment, which, upon inquiry at the War-office, he was told had sailed for India; this was held sufficient to let in proof of his handwriting; *Wyatt v. Bateman*, 7 Car. & P. 586; E. C. L. R. 32. So where a week before the trial, the parents of an attesting witness being asked where he was, stated that he was in America; *Austin v. Rumsey*, 2 C. & K. 736; E. C. L. R. 61. An inquiry of the servant where it was said the witness might be heard of, was held sufficient to let in evidence of the witness's handwriting, and that it was not necessary to show that he was kept out of the way by collusion; *William v. Worrall*, 8 C. & P. 380; E. C. L. R. 34. *Semble*, where grounds are shown for suspecting that he is purposely kept out of the way, proof of stricter search is requisite, *sed quære*.

ⁿ *Kay v. Brookman*, 3 C. & P. 555; E. C. L. R. 14.

^o *Earl of Falmouth v. Roberts*, 9 M. & W. 469.

inquiry was made in vain from the clerk and agent of the attesting witness, and five or six days before the trial, inquiry was made from his wife and servant at his house, who could give no information; a bailiff, from whom he had escaped, stated that he had searched for him without effect: and this was held to be sufficient.^p If an attesting witness has set out to leave the kingdom, his absence is sufficiently accounted for, although in fact the vessel *518] may have been unexpectedly *beaten back into an English port by contrary winds, at the time of trial.^q

It seems that the temporary illness of the attesting witness to an instrument would not be a sufficient ground for admitting secondary evidence.^r

Where the plaintiff, in order to prove his possession of a house, proposed to prove receipts for taxes given by the tax-gatherer, who had attended under a *subpoena* to give evidence, but had been seized with an apoplectic fit, and taken home dangerously ill before the trial came on, and it was proved that he was *in extremis*, the secondary evidence was rejected.^s

The party may also prove that the name of a person as attesting witness was introduced as such without the knowledge or assent of the parties, for in that case he is not an attesting witness;^t or that the name was merely fictitious.^u But it is no excuse to show that the witness has denied his attestation without calling him.^x

Where there is more than one attesting witness, and the absence of all but one is accounted for, the case seems to be the same as if the latter had been the only attesting witness, and he must be called

^p *Morgan v. Morgan*, 9 Bing. 359; E. C. L. R. 23.

^q *Ward v. Wells*, 1 Taunt. 461. And see *Varicas v. French*, 2 Car. & K. 1008; E. C. L. R. 61.

^r A trial at the assizes may be put off on an affidavit stating the illness of such a witness.

^s By Lord Ellenborough, *Harrison v. Blades*, 3 Camp. C. 457. Mansfield, C. J., in *Jones v. Brewer*, 4 Taunt. 46, says, "perhaps in some instances of sickness" the handwriting of a subscribing witness may be proved. See *Doe v. Evans*, 3 C. & P. 221; E. C. L. R. 14.

^t 4 Taunt. 220; *M'Craw v. Gentry*, 3 Camp. 232; *Cussons v. Skinner*, 11 M. & W. 161; *ante*, p. 503, note (r).

^u *Fasset v. Brown*, Peake's C. 23.

^x *Jones v. Brewer*, 4 Taunt. 46; See *Talbot v. Hodson*, 7 Taunt. 251; E. C. L. R. 2; *Fitzgerald v. Elsee*, 2 Camp. 635; *Lemon v. Dean*, 2 Camp. 636, n.; *Grellier v. Neale*, Peake's C. 146; *Ley v. Ballard*, 3 Esp. C. 173; *Boxer v. Rabeth*, Gow. 175; *contra*, *Phipps v. Parker*, 1 Camp. 412.

to prove the execution, and no other evidence can supply the place of his testimony.⁷

*Where there have been sufficient attesting witnesses, whose absence is satisfactorily accounted for, the proper proof is by giving evidence of the handwriting of the attesting witnesses; and it has been usual in such cases to give evidence also of the handwriting of the obligor.² This, however, is not necessary.³¹ The signature of an attesting witness, when proved,

⁷ Admitted in *Cunliffe v. Sefton*, 2 East, 183.

² *Adam v. Kerr*, 1 B. & P. 360; 2 East, 183, *supra*; 1 Str. 34.

³¹ *Kay v. Brookman*, 3 C. & P. 555; E. C. L. R. 14; *Nelson v. Whittall*, 1 B. & Ald. 19; *Page v. Mann*, M. & M. 79; E. C. L. R. 22.

¹ To warrant proof of the handwriting of subscribing witnesses, or either of them, as a substitute for their production, it must be proved that they are all dead or beyond the jurisdiction of the court; *Jackson v. Gager*, 5 Cow. 383; *Jackson v. Cady*, 9 Id. 140; *Lush v. Druse*, 4 Wend. 313; *Jackson v. Chamberlain*, 8 Wend. 620; *Jackson v. Waldron*, 13 Wend. 178; *Kelly v. Dunlap*, 3 Penna. Rep. 136; *Clark v. Boyd*, 2 Ohio Rep. 59; *Jones v. Cooprigder*, 1 Blackf. 47; *Zerby v. Wilson*, 3 Ohio Rep. 46; *Stump v. Hughes*, 5 Hayw. 93; *Lynch v. Postlethwaite*, 1 Mart. R. 209; *Irving v. Irving*, 2 Hayw. 27; *Johnson v. Knight*, 1 Murph. 293. Proof that one of two subscribing witnesses to a deed, removed from the State thirty years before the trial, and that the other has not been heard from for thirty-seven years, is accounting sufficiently for the absence of such witnesses, and on proof of the handwriting of one of the witnesses and of the grantor the deed was read in evidence; *Jackson v. Chamberlain*, 8 Wend. 620. When witnesses to ancient writings are dead, and such a period has elapsed since the execution that no person can be presumed to be living, who can testify to the handwriting of the parties or witnesses, evidence by a person verifying the signatures of the parties and witnesses is admissible, although his knowledge of such genuineness is derived solely from an inspection of other ancient writings, having the same signatures, which have been treated and preserved as muniments of title to estates; *Jackson v. Brooks*, 8 Wend. 426. When the deposition of a subscribing witness proved the execution of a bond by a man named Graham, but did not identify the present defendant, who was of the same name as the obligor, the court permitted his handwriting to be proved to identify him; *Mushron v. Graham*, 1 Hayw. 361.

G.

Where the testimony of neither of the subscribing witnesses to a deed can be obtained, proof of the handwriting of the grantor is admissible, without first proving the handwriting of the witnesses; *Woodman v. Segar*, 25 Maine, 90. Where the subscribing witness to a deed was an illiterate person and signed by his mark, and both he and the grantor were dead, it was held that as the mark could not be identified, the deed could be read on proof of the handwriting of the grantor; *Carrier v. Hampton*, 11 Iredell, 307; *Morgan v. Cortenius*, 4 McLean, 366. Proof of the handwriting of the grantor to a deed furnishes more satisfactory evidence of its execution than would proof of the handwriting of the subscribing witness; *Newsom v. Luster*, 13 Illinois, 175; see *Gelott v. Goodspeed*, 8 Cushing, 411.

is evidence of every thing upon the face of the instrument, for it is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place; and where there are several attesting witnesses, all of whom are accounted for, proof of the handwriting of any one is sufficient without proving that of the rest.^b It has been held indeed in some instances, that where the testimony of the attesting witnesses cannot be had, owing to their death, absence, interest, or any other disqualification accruing subsequently to the attestation, the signature of the party, as well as the witness,^c must be proved; and, in many instances, an admission by the obligor^d of the debt, or of the execution of the deed, *has been given in evidence. It seems, *520] however, to be now perfectly settled, for the reason already given, that evidence of the signature of one of the attesting witnesses alone is sufficient;° as in the case of *Adam v. Kerr*,^f where it

^b 1 B. & P. 360, *supra*; *Gough v. Cecil*, 1 Sel. N. P. 563; *Cunliffe v. Sefton*, 2 East, 183; *Prince v. Blackburn*, *ib.* 250. In *Hill v. Unett*, 3 Madd. 370, it was said, that if the witness be alive, proof must be given of the handwriting of the obligor. And that in such case, a parol acknowledgment would not be sufficient to dispense with evidence of the handwriting. See note (f).

^c *Wallis v. Delancey*, 7 T. R. 266, n.; *Coghlan v. Williamson*, Doug. 93.

^d Doug. 93; 2 East, 183. Where it was proved that the attesting witness had gone abroad two years ago, and it was not known what had become of him since, and the defendant had been heard to say he had sixteen years to come of the term granted by the lease, it was held that proof of the subscribing witness's handwriting was sufficient, though the party executing the deed was a marksman; *Doe d. Wheeldon v. Paul*, 3 C. & P. 613; E. C. L. R. 44. Where the attesting witness cannot be produced, proof of his handwriting is sufficient evidence of execution by the obligor, although only a marksman; *Mitchell v. Johnson*, M. & M. 176; E. C. L. R. 22; and where the subscribing witness to the deed of proprietors constituting a company was beyond seas, it was held that proof of his handwriting was sufficient, without further proof of the handwriting or identity of the parties; *Kay v. Brookman*, M. & M. 286; E. C. L. R. 22; and 3 C. & P. 555; E. C. L. R. 14.

^e *Kay v. Brookman*, 3 Car. & P. 555; E. C. L. R. 14; *Page v. Mann*, M. & M. 79; E. C. L. R. 22; *Adam v. Kerr*, 1 B. & P. 360; *Prince v. Blackburn*, 2 East, 250; *Milward v. Temple*, 1 Camp. 375; *Gough v. Cecil*, 1 Selw. N. P. 563. It is however frequently desirable to give evidence of the handwriting of the obligor, for the purpose of proving his identity, some evidence of which seems to be generally necessary; see *Parkins v. Hawkshaw*, 2 Stark. C. 239; E. C. L. R. 3; *supra*. *Nelson v. Whittall*, 1 B. & Ald. 19; *Middleton v. Sandford*, 4 Camp. 34; *Page v. Mann*, M. & M. 79; E. C. L. R. 22.

^f 1 B. & P. 360. But see *Hill v. Unett*, 3 Madd. 370, where the distinction is taken between the case where a witness is dead, and that where he is still living; in the latter case it was held, that proof of the handwriting of the obligor was necessary.

was proved that one witness was dead, and that the other was in Jamaica, and proof of the handwriting of the deceased witness was held to be sufficient, without proof of the handwriting of the other witness, or of the obligor. Some doubt, however, has existed upon the question, whether in such cases proof of the handwriting of the witness was sufficient, he being dead, without any further proof of the identity of the parties, except that of similarity of name and description. Lord Tenterden acted on the opinion, that no further evidence was necessary.⁵ But in the subsequent case of *Whitelock v. Musgrove*,^h some evidence of identity was held to be necessary. From *the more recent cases however it would appear that the ruling of Lord Tenterden was right,ⁱ and [521 that unless there be some circumstances to create ambiguity* no such proof of identity is incumbent on the party adducing the instrument, but it is incumbent on the other party to rebut the *primâ facie* case.

Where one of the attesting witnesses, after diligent inquiry made, could not be found, and the other had become interested since the attestation, it was held, that evidence of the handwriting of the latter witness was sufficient proof.¹ So where the witness, since the attestation, had been convicted of forgery.^m Where one of two witnesses was dead, and the other denied his signature, Lord Holt admitted evidence of the handwriting of the former.ⁿ By the 20

⁵ *Page v. Mann*, M. & M. 79, E. C. L. R. 22, *coram* Lord Tenterden, C. J. Notwithstanding the doubt expressed by Bayley, J., in *Nelson v. Whittall*, 1 B. & Ald. 21, referring to the opinion of Lord Kenyon, in *Wallis v. Delancey*, 7 T. R. 266, n., that the handwriting of the obligor of a bond in such case ought to be proved. See also *Doe d. Wheeldon v. Paul*, 3 C. & P. 613; E. C. L. R. 14; *Kay v. Brookman*, M. & M. 286; E. C. L. R. 22; 3 C. & P. 555; E. C. L. R. 14; *Mitchell v. Johnson*, M. & M. 176; E. C. L. R. 22.

^h 1 Cr. & M. 511. That was the case of an action on a promissory note made by a marksman.

¹ *Sewell v. Evans*, *Roden v. Ryde*, 4 Q. B. 626; E. C. L. R. 45; *Greenshields v. Crawford*, 9 M. & W. 314; *Humber v. Roberts*, 7 C. B. 861; E. C. L. R. 62; *Simpson v. Dismore*, 9 M. & W. 47.

^k *Jones v. Jones*, 9 M. & W. 75; *Barker v. Stead*, 3 C. B. 946; E. C. L. R. 54. In these cases the ambiguity arose from there being other persons of the same name.

^l *Cunliffe v. Sefton*, 2 East, 183. In this case there was also proof of the acknowledgment of the debt. See also 1 Str. 34; 1 P. Wms. 289; *Swire v. Bell*, 5 T. R. 372.

^m *Jones v. Mason*, Str. 833. But he would not be competent.

ⁿ *Blurton v. Toon*, Skin. 639.

Geo. III., c. 57, s. 38, as to deeds executed in the East Indies, and attested by witnesses resident there, it is sufficient to prove by one witness the handwriting of the parties and of the witnesses, and that the latter are resident in India. These provisions seem to have been superseded by the rules of evidence already stated.

If the deed or other instrument, when produced, appear^o to be *thirty years* old, no further proof is required; since after that time it is to be presumed that the attesting witnesses are all dead.¹

^o *Anderson v. Weston*, 6 Bing. N. C. 300; E. C. L. R. 37; *Potez v. Glossop*, 2 Ex. 191.

^p B. N. P. 255; Bac. Abr. Ev. F.; *Doe dem. Spilsburg v. Burdett*, 4 Ad. & E. 1; E. C. L. R. 31; *Doe dem. Oldham v. Wolley*, 8 B. & C. 22; E. C. L. R. 15. So in case of a will thirty years old, reckoning from the time of execution. See WILL; *Miller v. Miller*, 2 Bing. N. C. 76; E. C. L. R. 29. The rule applies generally to deeds concerning lands, bonds, and other specialties; *Governor of Chelsea Waterworks v. Cowper*, 1 Esp. C. 275; entries in steward's books; *Wynne v. Tyrwhitt*, 4 B. & Ald. 376; E. C. L. R. 6; letters and other written documents, *ib.*; *Doe v. Beynon*, 12 Ad. & E. 431; E. C. L. R. 40. For the rule is founded on the antiquity of the instrument, and the great difficulty, nay the impossibility, of proving the handwriting after such a lapse of time. See *R. v. Ryton*, 5 T. R. 259; *Fry v. Wood*, Sel. N. P. 564; *Dean and Chapter of Ely v. Stewart*, 2 Atk. 44; *Manby v. Curtis*, 1 Price, 132; *Bertie v. Beaumont*, 2 Price, 308. Where a letter, dated in 1748, was found in the possession of the representative of the defendant's attorney, it was held to be *prima facie* evidence to prove that the letter had been written to him, although it was without address, the envelope having been lost; *Fenwick v. Reed*, 6 Mad. 8. It was held, in the same case, that a letter found among his papers, and appearing from its contents

¹ A deed of conveyance thirty years old unaccompanied by any suspicious circumstances, requires no proof but is good evidence of itself. This rule of law is so well established that if the subscribing witnesses were known to be alive and within the jurisdiction of the court, it would be unnecessary to call or produce them; *Henthom v. Doe*, 1 Blackf. 162; *Hanes v. Peck's Lessee*, Martin & Yerger, 228; see also *Roberts v. Stanton*, 2 Munf. 129; *Newlitt v. Cock*, 7 Wend. 371. But it has been held in Massachusetts that if the subscribing witness to a deed be living he should be called, although the deed is more than thirty years old; *Tolman v. Emerson*, 4 Pick. 160.

G.

In the case of *Jackson v. Blanshaw*, 3 Johns. 292; Kent, C. J., says, "It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed; see also 9 Johns. 169, *Doe v. Phelps*; 10 Johns. 475, *Doe v. Campbell*. This is also the doctrine of the courts of Maryland; *Huddy v. Harryman*, 3 Har. & McHen. 581; *Joce v. Harris*, 1 Id. 196; *Carroll v. Norwood*, 1 Har. & J. 174; in each of which cases, possession under the deed was held to be essential to its admissibility. So in South Carolina, a deed thirty years old cannot be given in evidence without the regular proof unless it first be shown that possession has accompanied it; *Thompson v. Bullock*, 1 Bay, 364; *Middleton v. Mass*, 2 Nott & McCord, 55. The same would seem to be the law of Virginia;

And it seems to be clearly established, *that this is not a mere *prima facie* presumption that the witnesses are dead, [*522

to have been written by the attorney's London agent, was admissible in evidence; *Ibid.* In *Beer v. Ward*, on the trial of an issue as to the legitimacy of a particular person, a very old letter, purporting to bear the signature of the head of the family, and brought from among the title-deeds kept at the family-seat, was admitted without proof of the handwriting, by Dallas, C. J., Mich., 1821, and by Lord Tenterden, 1823. In favour of an ancient certificate, recognized by the certifying parish, it will be presumed that the churchwarden who executed the certificate was duly sworn; *R. v. Whitchurch, Inhab.*, 7 B. & C. 573; *E. C. L. R.* 14; *Marsh v. Colnett*, 2 Esp. C. 665; and see *R. v. Farrington*, 2 T. R. 466. In the case of *The King v. Netherthong*, 2 M. & S. 337, it was held, that a certificate by the appellant parish (sixty years old) might be read in evidence when produced by a rated inhabitant of the respondent parish, without any account given of its custody; and the court intimated that he might, if necessary, be examined by the appellants as to the custody. A bond, thirty years old, found amongst the papers of a corporations, who were the obligees, is admissible without proof of the handwriting of the obligor or attestating witness; *The Governor and Company of the Chelsea Waterworks v. Cowper*, 1 Esp. C. 275; *Rees v. Mansell*, Selw. N. P. 564. On a question whether certain lands, which had been approved from a waste, were subject to a right of common, several counterparts of old leases kept among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord free from any such charge, were allowed to be evidence for the plaintiff claiming under the lord of the manor, though possession under the leases was not shown; *Clarkson v. Woodhouse*, 5 T. R. 412, n.

Roberts v. Stanton, 2 Munf. 129; *Lee v. Tapscott*, 2 Wash. 276. Of Pennsylvania; *Shaller et al. v. Brand*, 6 Bin. 435. And also of Connecticut; *Mallory et al. v. Aspinwall et al.*, 2 Day, 280; see *Thomas's Lessee v. Horlocker*, 1 Dallas, 14; *Tolman v. Emerson*, 4 Pick. 160. M.

A deed thirty years old where possession has gone with the deed proves itself; *Green v. Chelsea*, 24 Pick. 71; *Parris v. Eubanks*, 1 Speers, 183; *McClesky v. Leadbeater*, 1 Kelly, 551; *Doe v. Eslava*, 11 Alabama, 1028; *Willson v. Betts*, 4 Denio, 201; *Winston v. Gwathmey*, 8 B. Monroe, 19; *Troup v. Hurlbut*, 10 Barbour Sup. Ct. 354; *Hedger v. Ward*, 15 B. Monroe, 106; *Reaume v. Chambers*, 22 Missouri, 36; *Clark v. Wood*, 34 N. Hamp. 447.

Proof that a deed of land is more than thirty years old, without other circumstances, is no evidence of its authenticity, especially where no possession has been taken under it, and the land has been held adversely, although the deed is shown to have been in the custody in which it would have been likely to be if genuine; *Willson v. Betts*, 4 Denio, 201; *Horner v. Cilley*, 14 N. Hamp. 85; *Ridgely v. Johnson*, 11 Barb. Supt. Ct. 527.

Contra. If an instrument offered in evidence as an ancient deed, be proved to be thirty years old, it is not necessary to show that it came from the proper custody, and that possession has been held under it; *Brown v. Wood*, 6 Rich. Eq. (S. C.) 155. Continual possession under an ancient deed, when execution is not proved, is not the sole sufficient test of its authenticity; *Caruthers v. Eldridge*, 12 Grattan, 670.

*523] which is liable to be rebutted *by proof that the attesting witnesses are still alive, so as to render it necessary to call them; but that it is a peremptory rule of law, founded upon general convenience, that such proof, after a lapse of thirty years, shall be unnecessary.^a Where, however, the deed labours under any suspicion, arising from any rasure or interlineation, it is a matter of prudence and discretion to prove it in the usual way by means of an attesting witness, if any be still living, or by proof of the handwriting of an attesting witness, where they are all dead,^r in order to rebut the unfavourable presumption arising from an inspection of the deed; and this ought more especially to be done if the deed import fraud; as, where a man conveys a reversion to one, and afterwards conveys it to another, and the second purchaser proves his title; because in such case the presumption arising from the antiquity of the deed is destroyed by an opposite presumption; for no man shall be supposed guilty of so manifest a fraud.^s

The same rule applies to other old writings, such as receipts^t and letters.^u Where an indenture of apprenticeship had been *524] executed thirty years ago, and the parish in which the pauper had resided had treated him as a parishioner for twelve years, it was presumed that the indenture had been lost, and that it had been properly stamped, although it was proved by the deputy

^a *Doe v. Wolley*, 8 B. & C. 22; E. C. L. R. 15; Lord Tenterden, C. J., in that case observed, that the allowing the presumption of the death of the attesting witness to be rebutted, would be but a trap for a nonsuit. And see B. N. P. 255; *Marsh v. Colnett*, 2 Esp. C. 665. In *Rees v. Mansell*, Selw. N. P. 564, Baron Perrott is stated to have ruled to the contrary, on the ground that the lapse of time afforded mere presumptive evidence of the death of witnesses. But another case was cited to Mr. B. Perrott upon that occasion, in which Mr. J. Yates, for the sake of the practice, would not allow the witness to prove an old deed, although he attended for the purpose. And see *Doe v. Burdett*, 4 Ad. & E. 1; E. C. L. R. 31.

^r *Chettle v. Pound*, B. N. P. 255; Bac. Abr. Ev. F. But see *Trimblestown v. Kemmis*, 9 Cl. & F. 763.

^t B. N. P. 255; Bac. Abr. Ev. F.

^u *Bertie v. Beaumont*, 2 Pri. 308; *Bullen v. Michel*, 2 Pri. 399; 4 Dow. 297; *Wynne v. Tyrwhitt*, 4 B. & Ad. 376; E. C. L. R. 24; *Dean of Ely v. Stewart*, Atk. 44; *Manby v. Curtis*, 1 Pri. 225.

^s In *Beer v. Ward*, cor. Dallas, C. J., Sitt. after Mich. 1821; and cor. Lord Tenterden, C. J., K. R. Sitt. after Trin. 1823, on an issue as to the legitimacy of A. B., an old letter, purporting to be signed by the head of the family, and brought from among the title-deeds at the family seat, was admitted to be read.

registrar and comptroller of the apprentice duties, that it did not appear to have been stamped from 1773 to 1805.*

It has already been observed, that in order to give authenticity to an ancient instrument which does not admit of proof by the ordinary tests, it is essential to show that it has been brought from the natural and legitimate repository;⁷ as in the case of terriers, ancient grants, an inspeximus, an endowment by a bishop. Where an old deed is given in evidence, without proof of its execution, some account ought to be given of the place where it has been kept;⁸ or evidence should be given so as to afford a presumption that the party has been in possession under the deed.^a But it is sufficient that a document be produced from a place where it was likely to be found, although it be not the most proper place of custody.^b As to such writings, some evidence should be given to afford a reasonable presumption^c that they were honestly and fairly obtained, and preserved for use, *and are free from suspi- [*525
cion of dishonesty. In ordinary cases, however, where the instrument is produced by one who has an interest in it, it is not necessary to show where the instrument has been kept; it is sufficient for overseers to produce a parish certificate thirty years old, without showing whence it came.^d So it was held to be sufficient

* *R. v. Long Buckby*, 7 East, 45. The binding being in the year 1774 or 1775.

⁷ *Supra*, p. 291.

⁸ B. N. P. 255, *ante*, p. 291.

^a Bac. Abr. Ev. F.; B. N. P. 254. In *Jewison v. Dyson*, 9 M. & W. 540, an order by the Chancellor and Council of the Duchy of Lancaster, made in 1670 to the coroners of the honors of Pontefract (within the duchy) as to the returns of inquests, was held admissible without evidence, that it had ever been acted on. And see *Doe v. Pulman*, 3 Q. B. 622; E. C. L. R. 43.

^b *Croughton v. Blake*, 12 M. & W. 205; *Bp. of Meath v. Winchester*, 3 Bing. N. C. 183; E. C. L. R. 32; *Slater v. Hodgson*, 9 Q. B. 727; E. C. L. R. 58.

^c Vin. Abr. tit. Evidence, A. 6; 7 East, 291; 4 B. & Ald. 376; E. C. L. R. 6; B. N. P. 255; *Forbes v. Wale*, 1 Bl. 532. Letters addressed to the party's mother, with whom she lived, and at whose death the keys and papers were delivered to her, were held to be properly in her custody; *Doe v. Beynon*, 12 Ad. & E. 431; E. C. L. R. 40. And where in ejectment by a mortgagee a prior deed of settlement was produced from the papers of the mortgagor, lately deceased, who was tenant for life under it, this was considered the proper custody; *Doe v. Samples*, 8 Ad. & E. 151; E. C. L. R. 35.

^d *R. v. Ryton*, 5 T. R. 259; see also *Dean and Chapter of Ely v. Stewart*, 2 Atk. 44; *Fry v. Wood*, 2 Sel. N. P. 564. A lessee occupied lands under a tenant for lives, and paid the rent reserved by the lease to one *Williams*. The day after the last life dropped, he obtained the lease from certain persons whose

for a rated inhabitant of a respondent parish, to produce a certificate above thirty years old, by the appellant parish.^e And where
 *526] the party who offers the instrument *in evidence is the proper depository then no proof of custody is necessary.^f

In a claim to a Scotch peerage where no patent of creation could be found, but the ancestor sat in Parliament, an original instrument, purporting to be under the great seal of Scotland, and produced from the repositories of the heir of entail of the family estates, is evidence of the creation of such peerage and of the limitations therein.^g

Upon the trial of an issue to ascertain the boundary between two parishes, where a box containing old terriers and other parish documents was produced, proof that they had been received from the son of the last rector of the parish, and had been transferred to the plaintiff, the present incumbent, was held to afford sufficient evidence as to their custody.^h Where however a book which purported to be the book of a former rector, came out of the hands of the defendant, being the grandson of the former rector, the proof

connection with it did not appear, and delivered it up to *Williams*, taking a fresh demise of the lands from him. This lease being* produced by the lessor was held to come from proper custody; *Rees v. Walters*, 3 M. & W. 527. A will fifty years old was produced by plaintiff's attorney, who received it from B., and the witness stated that when the same cause was before an arbitrator it was produced by B., and the defendant's attorney in his presence thereupon consented to its being admitted in evidence. *Patteson, J.*, held this to be slight but admissible evidence of the proper custody; *Doe dem. Bowdler v. Owen*, 5 C. P. 751; E. C. L. R. 34. So it is sufficient, if a lease creating a term to attend comes from the solicitor of the family of the party; *Doe v. Phillips*, 8 Q. B. 158; E. C. L. R. 55; or if a lease comes from the land agent of the lessors, although the agent be not in court; *Doe v. Keeling*, 11 Q. B. 884; E. C. L. R. 63. These cases seem to overrule in this respect what was said in *Evans v. Rees*, 10 Ad. & E. 151; E. C. L. R. 37; that it is not enough for the party, his counsel or steward to produce the document in court, but that some evidence of the custody should also be given.

^e *R. v. Netherthong*, 2 M. & S. 337. Lord Ellenborough, C. J., intimated that the rated inhabitant being brought forward as the mere depository of the instrument, if the party objecting wished to inquire into the custody, he might.

^f *Rex v. Ryton*, 5 T. B. 259; *Doe v. Phillips*, 8 Q. B. 158; E. C. L. R. 55; *Doe v. Keeling*, 11 Q. B. 884; E. C. L. R. 63. In *Doe v. Phillips*, *Patteson, J.*, observed, "It would be most inconvenient. if in cases where a deed is produced by a party's attorney, inquiries were to be made how and when he got it." *Cole-ridge, J.*, said that evidence of the custody was given, not as a ground of reading the instrument, but to afford the judge reasonable assurance of authenticity. So it is sufficient that a corporation produce corporation documents. 2 M. & S. 338.

^g *Huntley Peerage*, 3 Cl. & F. 349.

^h *Earl v. Lewis*, 5 Esp. C. 1.

of custody was held to be insufficient.¹ In the case of *Michell v. Rabbetts*,^k a grant to an abbey, contained in a manuscript entitled "*Secretum Abbatis*," in the Bodleian Library at Oxford, was rejected as not coming from the proper custody; and for the same reason an old grant of a priory, brought from the Cottonian Manuscripts in the British Museum, was also rejected for want of showing that the possession of the grant was connected with any person who had an interest in the estate.¹ Where *a writing, purporting to be an endowment of a vicarage, and another purporting to be [*527 an inspeximus of the former, under the seal of the Bishop of *Norwich*, had been purchased at a sale as part of a private collection of manuscripts, it was held, that coming out of the custody of a private person unconnected with the matters contained in them, they were inadmissible.^m But in a tithe-suit, a book which purported to be the book of a former collector of tithes, and seventy years old, in the hands of the successor to such collector, was admitted.ⁿ

In the case of *The Bishop of Meath v. The Marquis of Winchester*, it was held (in *quare impedit*) that a case stated by a former bishop for the opinion of counsel, and preserved with his private papers and family documents, was admissible; for, although the document in some respects related to the see, it might more reasonably be expected to be found among the bishop's private papers and family documents than in the public registry of the diocese.^o

Where the defendant, in a suit by the rector for tithe, offered in evidence a paper purporting to be a receipt given by a former rector to a person of the same name with the defendant, forty-five years ago, it was held to be admissible without proof of the handwriting of the rector, and without any proof as to the custody further than that it came out of the hands of the defendant; for

¹ *Randolph v. Gordon*, 5 Pri. 312.

^k 3 Taunt. 91; see *Lygon v. Strutt*, 2 Anst. 601, *ante*, p. 312.

¹ *Swinnerton v. Marquis of Stafford*, 3 Taunt. 91.

^m *Potts v. Durant*, 3 Anst. 789.

ⁿ *Jones v. Waller*, 3 Gwill. 847.

^o 3 Bing. N. C. 183; E. C. L. R. 32. On writ of error in Dom. Proc. it appeared upon the evidence there was only one ecclesiastical record preserved in the registry of the diocese of so early a date, whilst on the other hand the document was found in the same parcel with several papers belonging to the see, and in the same room with several visitation books of the diocese, and other papers relating to it. See this case also, 4 Cl. & Fin. 445. A deed likewise relating to the same subject, and in the same custody was held admissible. And see *Slane Peerage*, Cl. & Fin. 24.

none but an occupier could have acquired such a receipt.^p But
 *528] *where *Curtis*, the defendant in a similar suit, produced a
 paper purporting to be a receipt from *Smith* to one *Curtis*
 fifty years ago, but there was no evidence to show who *Smith* was,
 or where the paper had been kept, the evidence was rejected.^q

In the case of *Bullen v. Michell*,^r the question was between a vicar
 and occupier, whether a farm modus had existed immemorially;
 and after proof that search had been made in the proper registries
 for the original endowment of the vicarage by the abbey of Glas-
 tonbury, it was held, that a book purporting to be the ledger-book
 and chartulary of that abbey, and preserved amongst the muni-
 ments of the Marquis of *Bath*, the owner of some estates which
 formerly belong to the abbey, although not of the farm in ques-
 tion, was sufficiently connected with the abbey to be admissible
 in evidence as a genuine document which had belonged to the
 abbey.^s It was also held, that two documents contained in the
 book were evidence; the one being in the form of an appropriation,
 dated 1269, made by the Bishop of *Salisbury* to the abbey of Glas-
 tonbury, of the profits of a rectory, reserving to the bishop a power
 of ordaining a vicarage in the same church, of a specified yearly
 value, and the other containing a list of different articles of endow-
 *529] ment of the same vicarage.^t *It was likewise held, that the
 accounts of the rents of the abbey, also found among the
 same muniments, and containing the allowances and acquittances

^p *Bertie v. Beaumont*, 2 Pri. 303.

^q *Manby v. Curtis*, 1 Price, 225; Wood, B. *dissent*.

^r In *D. P.*, 2 Price, 399, *post*, 546, note (i).

^s It was observed by Gibbs, C. B., 2 Price, 410, that such a book as this pur-
 ports to be, usually contains a description of all the estates of the abbey, and all
 the transactions relating to them. When the abbey was dissolved, those estates
 went to the Crown, and the Crown afterwards granted them to different persons.
 The book, when the abbey was dissolved, would go the officers of the Crown, and
 when the Crown portioned out and made over the possessions of the abbey to other
 persons, the book could go to one only of those grantees, and the only possible
 way of connecting it with the abbey is by showing a connection between the pos-
 sessor and the Crown, and by raising a probability that the Crown may have
 handed over the book to its present possessor.

^t Wood, B., dissented from the other judges of the court upon this point: he
 admitted that the book had been sufficiently connected with the abbey to make it
 evidence as a copy of the endowment, supposing such evidence to be relevant;
 but he was of opinion that it was not relevant evidence upon that point, since the
 endowment was not disputed; and that for any other purpose these entries were
res inter alios, and mere memoranda of an executory project. See his observa-
 tions at length, 2 Price, 425.

of the abbey, were admissible. Copies from an ancient schedule, produced from the muniments of a corporation, and delivered to the toll collectors, by which they collected the tolls are admissible for the corporation, although it would have been otherwise if not shown to have been delivered to the collectors by the corporation, however accurately corresponding.^u

The first skin of an indenture relating to lands in question in the suit, which appeared to have been severed from the rest by a sharp instrument, which had cut away the seals and name of the parties who appeared by the indorsement to have executed it, was formerly in the custody of the plaintiff's steward until litigation commenced between him and the plaintiff, when it was handed over to the succeeding steward, and was produced by him on the trial of an issue in which the defendant derived title from the former steward. This was held to be the proper custody, and the document was admitted in evidence against the plaintiff.^x

Where no name of any attesting witness is subscribed, or where there are names subscribed which are proved to be fictitious,^y or of real persons who either did not actually witness the execution of the deed or other instrument,^z or who were in point of law incompetent to *attest it,* the execution may be proved by the testimony of any witness who was present when the deed [530 was executed;^b or it will be sufficient to prove the handwriting of the obligor, from which the sealing and delivery may be presumed,^c or his acknowledgment of the instrument.

^u *Brett v. Beales*, M. & M. 416; E. C. L. R. 22.

^x *Lord Trimblestown v. Kemmis*, 9 Cl. & Fin. 775; and see *Price v. Woodhouse*, 3 Ex. 616.

^y *Fasset v. Brown*, Peake's C. 23.

^z *Grellier v. Neale*, Peake's C. 146; *M'Crow v. Gentry*, 3 Camp. 232; *Cussons v. Skinner*, ante, p. 503, note (t). In *Phipps v. Parker*, 1 Camp. 412, where the party whose name appeared as the attesting witness negatived the attestation by him, Lord Ellenborough held, that the deed could not be proved by evidence of the handwriting of the supposed obligee, or of an acknowledgment by him; but this case is overruled; *Fitzgerald v. Elsee*, 2 Camp. 365, cor. Lawrence, J.: *Lemon v. Dean*, ib. 636, cor. Le Blanc, J. And where the attesting witness to a bond declared that he did not see it executed by the obligor; it was held that it was the same as if there had appeared to be no attesting witness, and that the execution was sufficiently proved by showing the handwriting of the obligor; *Boxer v. Rabeth*, Gow's C. 175; and see ante, pp. 572, 573.

^a Com. Dig. Ev. B. 3.

^b *Ibid.*; *Fitzgerald v. Elsee*, 2 Camp. 635; *Lemon v. Dean*, 2 Camp. 636.

^c Com. Dig. Evidence, B. 3; 1 Lev. 25; *Fasset v. Brown*, Peake's C. 33; 2 T.

Where the writing has been lost^d or destroyed, or so situated *531] that its production cannot be enforced,^e the *fact must be proved. If positive proof of the destruction cannot be had, it must be shown that a *bona fide* and diligent search has been made for it in vain where it was likely to be found.^{f1}

R. 41; *Grellier v. Neale*, Peake's C. 198; *Talbot v. Hodson*, 7 Taunt. 251; E. C. L. R. 2; the subscribing witness having denied that he saw the execution, a co-obligor having been released, swore that there was a seal on the bond when the defendant wrote his name opposite, but that the defendant did not seal it, nor put his hand to the seal, nor deliver it in the witness's presence. The jury, on the evidence being left to them, found for the plaintiff; and the court afterwards held that this had been properly left to the jury. If the obligor be a marksman, it seems his execution may be proved by a person who has seen him so execute instruments, and can speak to the mark; *George v. Surrey*, M. & M. 516; E. C. L. R. 22. For proof of handwriting, see tit. HANDWRITING, Vol. II.

^d A bill accepted abroad and negotiated here by the defendant on the plaintiff's account, may be treated as a lost bill; *Hunt v. Alewyn*, 3 C. & P. 284; E. C. L. R. 14.

^e Secondary evidence was held to be inadmissible where a letter was filed in the Court of Chancery, it being in the power of either party to produce it on application to the court; *Williams v. Munnings*, Ry. & M. 18; E. C. L. R. 21. And if it be in the hands of one who holds it as security for money owing to him, and refuses on his *subpœna* to produce it, such a condition of the document is equivalent for this purpose to loss; *Doe d. Gilbert v. Ross*, 7 M. & W. 102.

^{f1} *Goodier v. Lake*, 1 Atk. 446; *Lord Peterborough v. Mordaunt*, 1 Mod. 94. Where thirty-six years had elapsed since indentures were executed, which had been long since *functi officio*, and it was shown that every person had been applied to and called, in whose possession they might reasonably be expected to be found, secondary evidence was let in; *R. v. East Farleigh*, 6 D. & R. 146; E. C. L. R. 16. As to the necessity for search where there is no proper place of deposit, see *Doe v. Grazebrook*, 4 Q. B. 406; E. C. L. R. 45.

¹ If the non-production of a written instrument is satisfactorily accounted for, evidence of its existence and contents is admissible; *United States v. Reyburn*, 6 Peters, 352; *Minor v. Tillotson*, 7 Ibid. 99; *Denton v. Hill*, 4 Hayw. 73; *Jackson v. Cullum*, 2 Blackford, 228; *Blackburn v. Blackburn*, 8 Hammond, 81; *Armstrong v. Timmons*, 3 Harrington, 342; *Murray v. Buchanan*, 7 Blackford, 549; *Mulliken v. Boyce*, 1 Gill. 60; *Granger v. Warrington*, 3 Gilman, 299; *Creed v. White*, 11 Humph. 549; *Wiswall v. Knevals*, 18 Ala. 65.

The loss or destruction of a paper must be strictly proved, before other evidence of its contents can be received; and if a writing be offered as a copy, it must be strictly proved as such before it can be given in evidence; *Willis v. McDole*, 2 Southard, 501; *Boynton v. Rees*, 8 Pick. 329; *Dawson v. Graves*, 4 Call, 127; *United States v. Porter*, 3 Day, 283; *Caufman v. Congregation*, 6 Binn. 59; *Doe v. McCaleb*, 2 How. Miss. 756; *Bouldin v. Massie*, 7 Wheat. 122; *Redman v. Green*, 3 Iredell Ch. 54; *United States v. Boyd*, 5 Howard, 29; *Marshall v. Hany*, 9 Gill. 251; *Poe v. Dorrah*, 20 Ala. 288.

Secondary evidence of the contents of a written instrument is admissible when

The degree of diligence to be used in searching for a deed must depend on the importance of the deed and the particular circumstances of each case.⁵ It is not absolutely necessary that the search for the original document should be made for the purpose of, and shortly before the cause: where it had been made recently after the death of the party in whose possession it had been, although three years before the action, it was held to be sufficient to let in the secondary evidence.⁶

Inquiry was made after an indenture of apprenticeship at the house of the deceased master ten years after his death, in which house his widow and son still resided, and his goods and effects

⁵ *Per Best, C. J., in Gully v. The Bishop of Exeter*, 4 Bing. 290; *E. C. L. R.* 13; *Gathercole v. Miall*, 15 M. & W. 335; *Doe v. Lewis*, 20 L. J., C. P. 177.

⁶ *Fitz v. Rabbits*, 2 M. & Rob. 60.

it has been destroyed voluntarily through mistake or by accident; *Riggs v. Tayloe*, 9 Wheaton, 483. So when it is in the hands of a third person out of the jurisdiction of the court; *Ralph v. Brown*, 3 Watts & Serg. 395; *Waller v. Cralle*, 8 B. Monroe, 11; *Threadgill v. White*, 11 Iredell, 591; *Shepard v. Giddings*, 22 Conn. 282. Presumptive evidence of loss is sufficient; *Taunton Bank v. Richardson*, 5 Pick. 436; *Central Turnpike v. Valentine*, 10 Pick. 142; *Bouldin v. Massie*, 7 Wheat. 122; *Hathaway v. Spooner*, 9 Pick. 23; *Flinn v. McGonigle*, 9 Watts & Serg. 75; *Sturdevant v. Gains*, 5 Alabama, 435; *Turner v. Moore*, 1 Brevard, 236.

The loss or destruction of an instrument is a fact to be decided by the court before its contents can be proved, and is not afterwards to be submitted to the jury; *Witter v. Latham*, 12 Conn. 392; *Flinn v. McGonigle*, 9 Watts & Serg. 75; *Woodworth v. Barker*, 1 Hill, 172; *Wood v. Gasset*, 11 N. Hamp. 442; *Vaughan v. Biggers*, 6 Georgia, 188.

A party to a suit may be a competent witness to prove the loss of a deed or record, for the purpose of letting in secondary evidence but not to prove the contents thereof; *Adams v. Leland*, 7 Pick. 62; *Patterson v. Winn*, 5 Peters, 233; *Dan v. Brown*, 4 Cowen, 483; *Jackson v. Betts*, 6 Cowen, 377; *Shrowders v. Harper*, 1 Harrington, 444; *Harris v. Doe*, 4 Blackford, 369; *Woodworth v. Barker*, 1 Hill, 172; *Woods v. Gasset*, 11 N. Hamp. 442; *Stafford v. Stafford*, Saxton, 525; *Maynor v. Lewis*, 2 Georgia, 205; *Vedder v. Wilkins*, 5 Denio, 64; *Porter v. Ferguson*, 4 Florida, 102; *Wade v. Wade*, 12 Illinois, 89; *Wells v. Martin*, 1 Ohio State Rep. 386.

The proof necessary to establish the loss of a writing, so as to let in secondary evidence of its contents, must depend upon the nature of the transaction to which it relates, its apparent value and other circumstances. If suspicion hangs over the instrument or that it is designedly withheld, a rigid inquiry should be made into the reasons of its non-production; but if there is no such suspicion all that ought to be required is reasonable diligence to obtain the original, in respect to which the courts extend great liberality; *Juzan v. Toulmin*, 9 Alabama, 662; *Kelsey v. Hanmer*, 18 Conn. 311; *Waller v. School District*, 22 Conn. 326.

remained, and the son said that he could not find it, and some parol evidence was given to show that a deed of apprenticeship existed; the court held that the proof of binding was not sufficient.¹ Where there were two parts of an indenture of apprenticeship, one of *532] which was proved to have been destroyed, and the *other had been delivered to Miss *Taylor*, of Bomford, to whom the apprentice had been assigned; evidence was given that application had been made to Miss *Taylor*, who had ceased to reside at Bomford, for the part delivered to her, and that she had said that she could not find it, and did not know where it was, but Miss *Taylor*, though still living, was not called as a witness; the court held, that the part so delivered had not been sufficiently accounted for; it had been traced into the hands of Miss *Taylor*, but no further evidence had been given to show what had become of it.^k But where one part only of an indenture of apprenticeship had been executed, and both the pauper and master were dead at the time of the trial, and it appeared on the evidence, that on inquiry made from the pauper shortly before his death, he said that the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it: and inquiry had also been made of the daughter of the executrix of the master, who said that she knew nothing about it, and no further search was made, the court held the proof to be sufficient, since here, if the declaration of the pauper was admissible so as to show a possession by him, it also showed that further search was unnecessary; and on this ground it was distinguished from the case of *The King v. Castleton*, for there the evidence showed that a further search was necessary.^l

¹ *R. v. St. Helens in Abingdon*, B. S. C. 292, 735; 2 Bott, 481; but in this case the evidence seems to have been insufficient to prove a binding, independently of the objection that the proof of loss was insufficient for the purpose of admitting, secondary evidence; and the circumstances of the case rather negatived the existence of a valid indenture.

^k *R. v. Castleton*, 6 T. R. 236; see also *Williams v. Founghusband*, 1 Stark. C. 139; E. C. L. R. 2.

^l *R. v. Morton*, 4 M. & S. 48. The Court of King's Bench held that in such a case it was sufficient for the parties to show that they had used reasonable diligence; that these were terms applicable to some known or probable place or person in respect of which diligence may be used; that what the pauper said was admissible, and although it might not amount to proof of the fact that the indenture had been destroyed by him, it was so far evidence as to afford a reason why further search was not made with him. That if such an inquiry had been made of a merchant for some commercial purpose, and he had given a similar answer it would have been sufficient. It was like a non-production on request, and the

*The master of an apprentice having the indentures in his possession failed; an attorney took the management of [*533 his estate and the custody of his papers, which he inspected without finding the deed; this was held to be sufficient evidence of loss, though the widow was still living, and no inquiry had been made from her: such an inquiry would have been useless after such evidence as to the master's papers.^m But where, on an appeal against an order of removal, the appellants relying on the settlement of a person deceased by apprenticeship, called the widow of the deceased, who proved that her husband, in his last illness, told her that he had received the indentures from his master at the end of the apprenticeship, and had worn them out in his pocket, it was held that without further inquiry evidence of the conversation was inadmissible. And the case was distinguished from that of *Rex v. Morton*, on the ground that in that case inquiry had been made from the master's executrix.ⁿ

In the case of a parish apprentice, after reasonable proof has been given of a delivery of the indenture to the parish officers, proof should be given of a search in the parish chest, which is the proper place of deposit.^o

party accounts for it; and that this case was distinguishable from that of *R. v. Castleton*, for there the answer given was a reason for making further search. Where a person to whom letters had been written which were required to be produced, said that he had searched for them in a particular box in which *he had put them*, without being able to find them, but added that he thought they were somewhere in his possession, but that he had not searched in any other place, it was held that enough had not been done to let in secondary evidence; *Bligh v. Wellesley*, 2 Car. & P. 400; E. C. L. R. 12.

^m *R. v. Piddlehinton*, 3 B. & Ad. 460; E. C. L. R. 23.

ⁿ *R. v. Rawden*, 2 A. & E. 156; E. C. L. R. 29. The court observed, that the evidence was of a dangerous kind, and to be received with caution.

^o Where the mother of a parish pauper stated that she had received money from the officers of B. to put her son out as an apprentice; that she had accordingly put him out, and delivered the indenture to the wife of a market gardener, who was dead, having survived her husband, to be delivered to the overseers of B., and that search had been made in the parish chest of B. for the indenture without success; it was held that parol evidence was admissible, the parish chest being the proper place of deposit; *R. v. Stourbridge*, 8 B. & C. 96; E. C. L. R. 15; *M'Gahey v. Alston*, 2 M. & W. 206, *infra*, p. 538. So where search has been made in the parish chest of the binding parish for the indenture, which had been proved to have been delivered to *N. Badger*, the mother of the apprentice, to be delivered to the overseer, and the husband being dead, his executor was called to negative the existence of any such instrument among his papers; *Rex v. Bromsgrove*, East. T. 1828. Where the indenture was proved to have been

*An agreement for a lease had been deposited in the hands of the landlord, who, upon application to him by the lessee, refused to produce it. Ten years after this and three after the death of the lessor, the tenant, upon an appeal, swore that he did not know in whose possession the agreement was, and no inquiry had been made after it, and yet it appears that parol evidence was held to be admissible;^p and Buller, J., observed, that if it had been in proof that the executor of the lessor had been in possession of the instrument, it might have varied the case. After the expiration of the lease the lessee, the pauper, was entitled to it in strictness, but he neither had it, nor knew whether it existed; and it was then nine years after its expiration.^q But in general it must be shown that inquiry has been made after the deed;^r and, as appears above, it has been held that the loss of it must be proved by the person in whose hands it was at the time of the loss, or to whose custody it is traced,^s if that person be living;

delivered by a parish apprentice to his master, who was still living, it was held that the master's declaration, on application by the apprentice at the end of the term, that he had delivered the indenture to the parish officer, and proof that a fruitless search had been made among the papers of the parish for the indenture, were insufficient to let in parol evidence of the contents; *R. v. Denio Inh.* 7 B. & C. 620; E. C. L. R. 14; *R. v. Castleton*, 6 T. R. 136, cited by Bayley, J., as directly in point; but see 7 Q. B. 642; E. C. L. R. 53; and see *Williams v. Younghusband*, 1 Stark. C. 139; E. C. L. R. 2.

^p *R. v. North Bedburn*, Cald. 452.

^q *Qu.* whether, inasmuch as the document had been proved to be once in the possession of the lessor, who had refused to deliver it up, a presumption did not arise that it was in the hands of the representative? In fact no inquiry had been made after the deed, and there was no proof that it was not still in existence. In *Doe dem. Richards v. Lewis*, 20 L. J., C. P. 177, a deed conveying property to *P.* and *B.*, as trustees, was delivered to an attorney by *S.*, the woman who executed it clandestinely before her intended marriage, with directions not to give it up to any one save herself and her son together. He afterwards gave it up to *S.*, in the presence of her son, and there was no evidence that the deed had been seen since. Search had been made for it on *S.*'s premises; *P.* stated he had no knowledge of the existence of the deed till a short time before the trial, and had it not; but no search had been made among the papers of *B.*, who was dead, nor any inquiry of his representative. The court held the search insufficient, and Talfourd, J., observed, a search is never sufficient unless it negatives the possession of the deed by the party who, by law, should have the custody of it.

^r *R. v. St. Sepulchre*, 2 Bott. 482; Cald. 547.

^s *R. v. Castleton*, 6 T. R. 236. Where policies of insurance had been delivered to the assignees of a bankrupt, one of whom was since dead, proof of an application to the solicitor under the commission, who answered, that he did not know what was become of them, was held to be insufficient; *Williams v. Younghus-*

and if he be dead, application should be made to his representative, and search should be made amongst the documents of the deceased.

Where the witness applying to the vicar for the register of baptism is told that there was none prior to a particular date, the vicar not being called, his declaration is not evidence of the loss of such register so as to let in secondary evidence.[†]

*With respect, however, to the nature of the search which should be made for a document, it would appear that no general [536 rule exists; the question in every case is, whether there has been evidence enough to satisfy the court" that a *bonâ fide* search was made for the instrument where it was likely to be found; and that the omission to produce it does not arise from mere carelessness, neglect, or fraud. In the case in which these remarks were made, on an examination before removing justices, it was deposed, that after an apprentice's death *D.* had possession of the indenture of apprenticeship, and had stated on inquiry that she had given it to the master of a workhouse in which she was an inmate, that he was dead, and his widow had stated that she had searched his papers but could not find it, and had given up all parish papers to the assistant overseer; and it was further deposed that the latter stated that he had examined the papers but did not recollect seeing the indenture, and had handed them over to another overseer, who said that he had searched them but could not find it, and that *D.*, having died since the inquiry made of her, the master and matron

band, 1 Stark. C. 139; E. C. L. R. 2. But where an assignment of turnpike tolls had been executed by way of mortgage to *K.* In an action by *K.*'s executor against the trustees for arrears of interest, a search for the security in the office of *K.*'s solicitor where his papers had been deposited, except some which had been deposited in the office of a Master in Chancery in a suit against the executor, and also in that office without finding it, was considered sufficient evidence of its loss to let in secondary evidence: and it was held that entries in the mortgage book of the trustees containing the names of the creditors, the amount of their securities and the interest due upon them was such evidence; *Pardoe, Ex. v. Price*, 13 M. & W. 267.

[†]*Walker v. Beauchamp*, 6 C. & P. 552; E. C. L. R. 25.

"The question as to the admissibility of the secondary evidence is for the court, and not for the jury; and in this respect it resembles the question as to whether the custody from which an ancient document is produced be the proper one; *Reg. v. Kenilworth*, 7 Q. B. 642; E. C. L. R. 53; *Rees v. Walters*, 3 M. & W. 527, 531; *Doe v. Keeling*, 11 Q. B. 884; E. C. L. R. 63. In order to decide this question the court may receive answers to inquiries, without calling all the persons of whom those inquiries were made; (*Reg. v. Kenilworth*, and *ante*, note (1);) as in the case of inquiries after an attesting witness, see *ante*, p. 514, *et seq.*

of the workhouse where she died said that no papers were found in her possession, nor could the indenture be found amongst the papers left by the attorney who prepared it upon inquiry of his widow and search by her; secondary evidence was held by the court to have been properly admitted.^v

Where the purchaser of a weekly paper, upon an indictment for *537] a libel, swore that he believed that the original *had been destroyed, it was held to be sufficient proof to let in secondary evidence.^x Where a licence to trade with an enemy, granted by a governor of a colony, had been returned after being used to the secretary of the governor, who swore that it was his custom to put aside such licences amongst the waste papers in the office, as being of no further use; that he supposed that he had disposed of the licence in question in this manner; and that he had searched for it, but did not recollect whether he had found it or not, though he did not think that he had found it; the court were of opinion that the evidence satisfied what the law required in respect of search, and established with reasonable certainty the fact of the licence being lost. It was not, the court observed, to be expected that the witness should be able to speak with more confident certainty to a fact to which his attention was not particularly drawn at the time on account of any importance supposed to belong to it.^y Where a loss had been settled upon a policy of insurance against fire, in the year 1813, and upon a trial in 1819, the plaintiff, in an action for libel, charging him with having made fraudulent claims upon the insurance company with respect to such loss, called their agent, who stated that the policy was returned to him after the fire,

^v *Reg. v. Kenilworth*, 7 Q. B. 642; E. C. L. R. 53.

^x *R. v. Johnson*, 7 East, 65, *infra*, note (c.) It may be presumed that an useless instrument has been destroyed, see the observations of Bailey, J., in *R. v. East Farleigh*, 6 D. & R. 153, E. C. L. R. 16. See also *Kensington v. Inglis*, 8 East 273, *infra*. In an action for a libel in a newspaper, called the Nonconformist, published by the defendant, it was desired to prove that a copy had been sent to a public reading room in the plaintiff's parish to which there were many subscribers. The president of the reading room stated that a newspaper bearing that name was gratuitously sent to the room; that from the glance he had of it, he judged that it contained the libel complained of; that it remained there for a fortnight, when it was taken away as he supposed, and not returned; that he had searched the room for it and believed it was lost, and this evidence was considered sufficient to make secondary evidence of its contents admissible; *Gathercole v. Miall*, 15 M. & W. 319.

^y *Kensington v. Inglis*, 8 East, 273.

and that he had it in his possession *then, and afterwards when the plaintiff made a larger insurance with the com- [*538 pany; that upon the loss having been settled, the old policy became an useless paper; that he did not know what had become of it, but he believed he had returned it to the plaintiff. The clerk to the plaintiff's attorney then proved that within a few days of the trial he went to the plaintiff's house to search for the policy, when the plaintiff showed every drawer where he usually kept his papers, that he examined such drawers, and every other place wherein he thought it likely to find such a paper, without finding it. Held, that it was sufficient to entitle the plaintiff to give secondary evidence of the contents of the policy.^a

A check having been drawn on account of a parish, was delivered to the paying clerk of the parish; the bankers of the parish on the same day paid a sum of the same amount; the course was to return the cancelled check to the paying clerk to be deposited in an apartment of the workhouse. The paying clerk having gone out of office, application had been made (by a witness called) to his successor for an inspection of the checks; he handed to the witness several bundles which were searched unsuccessfully for the check in question, and it was held that secondary evidence was admissible.^a

Where it appeared that the magistrate who took the *in- [*539 formations had returned them to the clerk of the peace, and the clerk to the latter, stated that it was the practice where bills had been ignored to throw away the papers as useless, and that after searching, the informations could not be found; it was held, in an action for a malicious prosecution, that this was sufficient to let in secondary evidence of their contents, without calling the

^a *Brewster v. Sewell*, 3 B. & Ald. 296; E. C. L. R. 5. See also, *R. v. East Farleigh*, 6 D. & R. 147; E. C. L. R. 16.

^a *M'Gahey v. Alston*, 2 M. & W. 206. Where the warrant to the officer to seize under a *fi. fa.* was not produced nor was any notice given to produce it, and it appeared to have been given to the son of the officer, who believed he had either returned it to his father or to the sheriff's office, and the officer stated that it was usual to deliver it to the auctioneer, who transmitted it, with the auction sheet, to the Excise Office, through the district supervisor, and proof was given of search made by the auctioneer among his own papers, and at the sheriff's and excise offices, but the supervisor was not called, nor was any search amongst his papers proved; it was held, that sufficient diligence was proved to let in secondary evidence of the warrant to connect the officer with the warrant; *Minshull v. Lloyd*, 2 M. & W. 450.

clerk of the peace to show they were not in his possession : for if the informations were delivered to the deputy, they were delivered to him as the agent of the clerk of the peace, and not for his own purposes ; it was therefore to be presumed that the documents were not among his private papers, but rather among those in the custody of the clerk of the peace.^b The legal custody of a document appointing a particular person to an office, such as overseer, is in that person ; for he is the party most interested in the instrument, and requires its production as a sanction for what he does under its authority.^c A presumption hence arises that such an officer has the custody of his appointment, and consequently parol evidence cannot be given of such an appointment without proof of application to him,^d

*Where the appointment of overseers for the year 1802
*540] could not be found in the parish chest, and search had been made among the papers of *B.* deceased, who had acted as executor of the party who acted as overseer for that year ; it was held to be sufficient to let in parol evidence of the contents of that appointment, as being of a single overseer for that year.^e

Where the production of the instrument is on legal grounds impossible, the effect is the same in respect of secondary evidence as if it had been lost or destroyed. As where it is in a foreign country, from whence it cannot be removed.^f So if the instrument on

^b *Freeman v. Arkell*, 2 B. & C. 494 ; E. C. L. R. 9.

^c *Per* Lord Ellenborough, *R. v. Stoke Golding*, 1 B. & Ald. 173 In replevin and avowry by the defendants, as overseers, for the distress of poor's-rates, evidence that on one of them being applied to for his appointment he said he had lost it, was held to be sufficient to let in secondary evidence, the party not being capable of being called ; *Governors of Bristol Poor v. Wait*, 6 C. & P. 591 ; E. C. L. R. 25.

^d 1 B. & Ald. 173 ; and as to the custody of a sheriff's warrant, see 1 Stark, C. 413 ; E. C. L. R. 2. Where a warrant to seize for borough rates had been executed by the high constable, who said he had no doubt that he had deposited it in his office, yet he could not find it, and did not know where it was, but that the town clerk also had access to his office ; secondary evidence of it was admitted : *Fernley v. Worthington*, 1 M. & G. 491 ; E. C. L. R. 39. Where on a motion for a new trial, a document had been handed up to the judges, and could not afterwards be found ; it was held that no search was necessary to be made at the judge's chambers, as it was to be presumed to have been returned to the party producing it ; *Deacon v. Fuller*, 6 C. & P. 74 ; E. C. L. R. 25.

^e *R. v. Witherby*, 4 M. & Ry. 724.

^f *Alison v. Furnival*, 1 C. M. & R. 277. In *assumpsit* for money received, being the amount of a bill which the defendant had obtained, and paid into his banker's ; held that the bill not being produced, nor any account of it given, the

grounds of policy cannot be read.^f So if a party objects to the production of a deed by one who has possession as his trustee.^{h1}

*When sufficient evidence has been given of the loss of the deed or other instrument, of which the Court is to judge,ⁱ it must be shown that the instrument existed as a genuine

banker's clerk could not be asked as to a bill paid in by the defendant, answering to it in description, and credited to him; but it afterwards appearing that the bill was in Scotland, out of the jurisdiction, so that the plaintiff could not compel the production of it, a new trial was granted on payment of costs; *Atkins v. Owens*, 4 Nev. & M. 123; E. C. L. R. 30; and 2 Ad. & Ell. 35; E. C. L. R. 29. But see *R. v. Douglas*, 1 Car. & K. 670; E. C. L. R. 47.

^e Thus if a document be in the hands of an attorney, and out of regard to his client's privilege or his own lien it cannot be read, secondary evidence is admissible; *Mills v. Oddy*, 6 C. & P. 732; E. C. L. R. 25; *Marston v. Downes*, 1 Ad. & Ell. 31; E. C. L. R. 28; *Doe dem. Gilbert v. Ross*, 7 M. & W. 102; *Hibbard v. Knight*, 2 Ex. 11; *Newton v. Chaplyn*, 19 L. J., C. P. 374; *Lloyd v. Mostyn*, 10 M. & W. 478; *Higgs v. Taylor*, 5 Car. & K. 85; E. C. L. R. 47. In *Doe v. Owen*, 8 C. & P. 110; E. C. L. R. 34. Lord Abinger expressed an opinion that *Mills v. Oddy* was not law, but this was erroneous. In *Doe v. Ross* it was pointed out that the attorney must be served with a *subpoena duces tecum*; and that perhaps it may be necessary to show that the client also objects to the production of the document; but the objection of the client in open court is sufficient, though he has been served with only a *subpoena*, and not a *subpoena duces tecum*; *Newton v. Chaplin*, 19 L. J., C. P. 374.

^h Where the defendant called a party, who as trustee held a deed of composition between the plaintiff and other creditors and the mother of the defendant, but the defendant was no party to it, and the plaintiff objected to its being produced; it was held that secondary evidence might be given of its contents by a party who had made an extract from it; (*per Gurney, B.*) *Cocks v. Nash*, 6 C. & P. 154; E. C. L. R. 25.

ⁱ *Harvey v. Mitchell*, 2 M. & Rob. 366; see *R. v. Kenilworth*, 7 Q. & B. 642, *supra*, p. 536, n. (u), E. C. L. R. 53.

¹ A copy of a deed may be read in evidence, upon the oath of a party that he had searched the clerk's office and all other places, where he supposed the original deed might probably be found; *Ben v. Peete*, 2 Randolph, 539. The book of the judge of the probate court may be given in evidence, where the original will is proved to be lost; *Jackson v. Lucett*, 2 Caines, 363. Where a deed is proved to be lost, and its execution established by a subscribing witness, a copy, sworn to have been made out by a clerk, as a true copy, is admissible to show title in the lessor of the plaintiff in ejectment; *Morgan v. Marshall*, 7 J. J. Marshall, 316. An ancient record of a deed in a book of records and in the writing of the town clerk, though not signed or certified by him, is admissible; the loss of the original having been shown; *Booge v. Parsons*, 2 Vermont, 456. Copies of deeds, made by disinterested persons of good character, and under circumstances that create no imputation of fraud, may be received in evidence where the original is proved to be lost; *Allen v. Parish*, 3 Ham. 107.

instrument;^k that it was written on stamped^l paper or parchment; and in case of apprentice deeds, what sum was paid with the apprentice, and that the deed bore an *ad valorem stamp*;^m for the consciousness of a defect of this nature may have been a motive *542] for concealing or destroying the instrument.ⁿ¹ But the *presumption seems to be that an instrument not found after

* *Goodier v. Lake*, 1 Atk. 446; *R. v. Sir T. Culpepper*, Skinner, 673. But where the terms of a license required that the time of sailing should be endorsed thereon, and the license was burnt at the custom-house, a proper endorsement was presumed; *Butler v. Allnutt*, 1 Stark. C. 222; E. C. L. R. 2. Where the lessor read the terms of a demise to the tenant, who did not sign them, nor were they shown to him, parol evidence of those terms was admitted; *Trewhitt v. Lambert*, 10 A. & E. 470; E. C. L. R. 37.

¹ Where the plaintiff had lost his part of an agreement under seal, after it had been duly stamped, and the defendant upon notice produced his part unstamped, it was held that it might be read in evidence; *Munn v. Godbold*, 3 Bing. 292; E. C. L. R. 11. See further, Vol. II. tit. STAMP; and see also *Garnons v. Swift*, 1 Taunt. 507.

^m See *Goodier v. Lake*, 1 Atk. 446; Burn, J., tit. POOR.

ⁿ Where however, a party in possession of an original deed or other instrument withholds it, after notice to produce, it may under the circumstances be presumed that the instrument was properly stamped; *Crisp v. Anderson*, 1 Stark. C. 35; E. C. L. R. 2; *Waller v. Horsfall*, 1 Camp. C. 501; *Pooley v. Goodwin*, 4 Ad. & E. 94; E. C. L. R. 31. But where the plaintiff relied on an agreement upon the deposit of some goods in the defendant's possession as a security, which the latter refused upon notice to produce, whereupon a witness produced a copy of it which he had kept, but on cross-examination stated that the original was not stamped when given to the defendant, and it appeared the plaintiff's attorney had had an inspection of it shortly before the trial, and he was not called, the court held that

¹ The instrument must be proved to have been duly executed with the formalities required by law; *Kimball v. Morrill*, 4 Greenleaf, 368; *Elmondorff v. Carmichael*, 3 Litt. 472; *Shrouders v. Harper*, 1 Harrington, 444; *Porter v. Wilson*, 1 Harris, 641; *Stone v. Thomas*, 2 Jones, 209.

After proof of the loss or destruction of a deed, its execution and contents are to be established by the subscribing witnesses, if they can be had; otherwise by other legitimate testimony, declarations of the grantor, &c.; *Griffith v. Huston*, 7 J. J. Marshall, 385; *Kelsey v. Hammer*, 18 Conn. 311; *Anderson v. Snow*, 8 Alabama, 504. The due execution of a lost deed, thirty years old may be presumed; *Beall v. Dearing*, 7 Alabama, 124. In the case of a lost bond, the acknowledgment of the obligor that he executed it is held sufficient proof without producing the subscribing witnesses; *Maynor v. Lewis*, 2 Georgia, 205. Where an attorney stated that a letter was written to him by the plaintiff, which was lost and the contents not remembered by him, another person, to whom the attorney showed the letter, is competent to prove its contents, although he has no knowledge of the handwriting. The identity of the letter and the proof of its contents are questions for the jury; *Curry v. Robinson*, 11 Alabama, 266.

reasonable search made has been duly stamped.^o Its execution must be proved according to the nature of the instrument;^p if a deed, by means of an attesting witness, or by proof of his handwriting, if he be dead, or that of the obligor, if the deed be not attested, in the manner already stated.^q

But where proof of the execution would have been dispensed with in case the original had been produced, proof of execution is unnecessary^r where the deed is lost. So where the want of the original is occasioned by the default or misconduct of the adversary.^q

After proof of the due execution of the original, the contents should be proved by means of a counterpart,^s or other original, if there be one, it being an established rule that all originals must be accounted for before *secondary evidence can be given [^{*543} of any one;^t no evidence of a mere copy is admissible,

the presumption of its being properly stamped, might arise from its non-production, was rebutted, and the copy was properly rejected; *Crowther v. Solomons*, 6 C. B. 758; E. C. L. R. 60.

^o *Hart v. Hart*, 1 Hare, 1; *R. v. Long Buckby*, 7 East, 45; *Pooley v. Goodwin*, 4 Ad. & E. 94; E. C. L. R. 31; 1 Stark. C. 35; E. C. L. R. 2.

^p *R. v. Culpepper*, Skinner, 673, by Lord Hardwicke, C. J.; *Goodier v. Lake*, 1 Atk. 446. Where a note has been lost, a copy is not evidence unless the note be proved to be genuine. An endorsement on a draft deed by one of the defendants, who was a clerk in the solicitor's office, of the engrossment of a deed, is not sufficient evidence of execution to let in secondary evidence; *Doe v. Whitefoot*, 8 C. & P. 270; E. C. L. R. 34.

^q But *quere* whether this is strictly necessary, as it is now well settled that there are no degrees of secondary evidence; *Doe v. Ross*, 7 M. & W. 102; *Hall v. Ball*, 3 M. & G. 242; E. C. L. R. 42; *Brown v. Woodman*, 6 C. & P. 206; E. C. L. R. 25; the omission to produce the best evidence being merely matter of observation. In *Cooke v. Tanswell*, 8 Taunt. 450; E. C. L. R. 4; *Poole v. Warren*, 8 Ad. & E. 582; E. C. L. R. 35; where an attested instrument was in the possession of the other side, it was held unnecessary to call the attesting witness.

^r *Goodier v. Lake*, 1 Atk. 446.

^s The counterpart of a lease, purporting to have been executed by the lessee of a lease granted by the mortgagor in conjunction with the mortgagee, cannot be read against one who claims under the mortgagee, without some evidence that the original lease which has been lost was executed by the mortgagee; *Doe v. Traupaud*, 1 Stark. C. 281; E. C. L. R. 2. But it was held, that proof that the original lease was signed by the mortgagee, the attesting witness not being known, would be sufficient to warrant the reading of the counterpart; *Ibid*.

^t *Pritchard v. Symonds*, B. N. P. 254; *R. v. Castleton*, 6 T. R. 236. *Per Parke, P.*, in *Alivon v. Furnival*, 1 Cr. M. & R. 292; *Brown v. Woodman*, 6 C. & P. 206; E. C. L. R. 25; *infra*, note (g).

until proof has been given that the counterpart cannot be produced,^a even although such counterpart was not stamped.^z If there be no counterpart, a copy may be proved in evidence by any witness who knows that it is a copy, from having compared *544] it with the original;^z or the party may produce an *abstract, or give in evidence a deed executed by the adversary, in which the instrument to be proved is recited;^a or even give parol evidence of the contents of a deed.^b It was at one time thought

^a *R. v. Castleton*, 6 T. R. 236; *Thurston v. Delahay*, Hereford Ass. 417; 4 B. N. P. 254, *semble*, *R. v. Kirby Stephen*, B. S. C. 664; *Liebman v. Pooley*, 1 Stark. C. 167; E. C. L. R. 2; *Doxon v. Haigh*, 1 Esp. C. 409; *Alivon v. Furnival*, 1 Cr. M. & R. 292. Where there are several parts of a deed, of which one is in the hands of the defendant, who has notice to produce it, and the others are inaccessible to the plaintiff, he may give a copy in evidence; *Doxon v. Haigh*, 1 Esp. C. 409.

^z Where it was proved that there were two parts of a deed on which the action was founded, that executed by the defendant being lost, it was held, that the counterpart executed by the plaintiff, and not the draft, was the next best evidence, and admissible in evidence as an authenticated copy, although not stamped; *Munn v. Godbold*, 3 Bing. 292; E. C. L. R. 11. And see *Villiers v. Villiers*, 2 Atk. 71; and B. N. P. 254. But whether a copy or other secondary evidence would not have been admissible seems to be at least questionable; see *Doe v. Wainwright*, 5 Ad. & E. 523; E. C. L. R. 31.

^a B. N. P. 254; 1 Keb. 117; *R. v. Kirby Stephen*, B. S. C. 664; *Lloyd v. Mostyn*, 10 M. & W. 478, *infra*, note (g); *Crawford and Lindsay Peerage*, 2 H. of L. Ca. 534. An entry in the register-book at the custom-house, stating that a certificate of a register was granted on an affidavit by A. that he was an owner, is not secondary evidence of the contents of the affidavit. Some person who has seen and knows it was made by A., must be called; *Teed v. Martin*, 4 Camp. 90. Where one writing is offered as secondary evidence of the contents of another, it is not necessary to prove that one was taken from the other, or that they have been collated; it is sufficient if both were copied from the same draft, by a person who believes them to be correct; *Medlicot v. Joyner*, 1 Mod. 4. But as to a copy of a copy, see *Everingham v. Roundell*, 2 M. & Rob. 38. A machine copy, produced by the person who made, though did not compare it, is admissible; *Simpson v. Thoreton*, 2 M. & Rob. 433. The contents of a tablet in the church were admitted without producing an examined copy; *Doe d. Coyle v. Cole*, 6 C. & P. 359; E. C. L. R. 25.

^a See *Burnett v. Lynch*, 5 B. & C. 601; E. C. L. R. 11; Com. Dig. tit. Ev. B. 5; *Skipwith v. Shirley*, 11 Ves. 64. Such a deed would, however, seem to be original evidence; see *ante*, p. 506, note e.

^b *Sir E. Seymour's case*, 10 Mod. 8; *R. v. Motheringham*, 6 T. R. 556; *Cocks v. Nash*, *ante*, p. 541; *Brown v. Woodman*, *infra*. In trover against the sheriff by assignees, the warrant to the officer having been lost, parol evidence of its contents to connect the officer with the sheriff was held to be admissible, without calling for the entry in the book at the sheriff's office; *Moon v. Raphael*, 7 C. & P. 115; E. C. L. R. 32.

that the party who could not produce the original document was bound to give the next best evidence of it; but it seems now to be settled that, although the several means of proof above mentioned have different degrees of force as evidence, their admissibility is not regulated by such gradations. With reference to the question of admissibility there are no degrees of secondary evidence; but where it is admissible at all, even parol evidence may be received, notwithstanding an attested copy, or other better secondary evidence, is in existence.^c It has been said, that where possession has gone along with a deed for many years, the original of which is lost or destroyed, an old copy may be given in *evidence, without proof that it is a true copy, because it may be impossible to give better evidence.^d Letters [*545 patent creating a peerage not being to be found, entries in the Lords' Journals showing the limitations of the barony were

^c If proof can be given of a complete copy, such proof is no doubt preferable to a mere abstract and it was once doubted whether proof of an abstract was sufficient where a copy appeared to be in existence; see *Doe dem. Rowlandson v. Wainwright*, 5 Ad. & E. 520; E. C. L. R. 31; *Munn v. Godbolt*, 3 Bing. 294; E. C. L. R. 11. The general rule, however, seems now to be settled, that the law does not recognize gradations of mere secondary evidence after all in the nature of original evidence has been accounted for; *Doe dem. Gilbert v. Ross*, 7 M. & W. 102; *Hall v. Ball*, 3 M. & G. 243; E. C. L. R. 42; *Jeans v. Wheadon*, 2 M. & Rob. 486; *Doe d. Moore v. Williams*, Car. & M. 615; E. C. L. R. 41; *Brown v. Woodman*, 6 C. & P. 206; E. C. L. R. 25. In that case the defendant having given the plaintiff notice to produce a letter, of which he (the defendant) had kept a copy, and the letter not being produced, it was held that he might give parol evidence of its contents, and that he was not bound to put in the copy. The principal reason for this seems to be that the party has not necessarily the means of knowing what is the next best evidence.

^d B. N. P. 254; Style, 253. The reason that it may be impossible to give better evidence is by no means a satisfactory one; and in general the contingent impossibility of procuring better evidence will not warrant the admission of evidence which is in itself otherwise defective. The reception of evidence from necessity must be founded on a general necessity, or probability of the failure of all other and superior evidence arising out of the nature of the case; as formerly in the instance of servants and agents. *Qu.* whether in the above case such a copy would be evidence, without some proof of its being a true copy of a lost original. See Bac. Abr. Evid. F. And where possession had gone with the deed (an agreement of demise) for sixty years, and the deed could not be found in the muniment room of the plaintiff, but a paper purporting to be an attested copy was found there, both the attesting witnesses to which were dead, and it was proved that persons of the names of the attesting witnesses to the original were also dead; Pollock, C. B., refused to admit the copy in evidence, *Brindley v. Woodhouse*, 1 C. & K. 647; E. C. L. R. 47.

admitted by the House on a claim of peerage.^g And an examined copy of the record of the patent produced from the proper office, was admitted under similar circumstances, on a claim to vote at elections of Irish peers.^f In the *Slane Peerage case*, where there was no patent of creation or enrolment to be found, and the contemporary Lords' Journals were not in existence, an old book purporting to be copied from them by an officer of the House, whose duty it was to prepare lists of peers present and absent, was received as evidence of the fact of a peer sitting in parliament.^g The registry of a conveyance in a register county is not evidence, unless the defendant has had notice to produce the conveyance, or it is lost.^h

*546] *After proof of ineffectual search for the deed of endowment of a vicarage, a chartulary of an abbey to which the rectory formerly belonged, stating the particulars of endowment, and found in the possession of the owner of the abbey lands, is admissible as secondary evidence.ⁱ In *the *Fitzwalter Peerage* *547] *case* a copy of a will produced from the prerogative office

^g *Barony of Saye and Sele*, 1 H. of L. Cases, 507.

^f *Lord Lainesborough's case*, 1 H. of L. Cases, 510.

^g 5 Cl. & F. 24.

^h *Molton v. Harris*, 2 Esp. 549. An examined copy of the registry of a deed in a register county, is admissible as secondary evidence; *Doe v. Kilner*, 2 Car. & P. 289; E. C. L. R. 12; *Collins v. Maule*, 8 Car. & P. 502; E. C. L. R. 34, but it has been said only against the parties to it, or those who claim under them; *Doe d. Loscombe v. Clifford*, 2 Car. & K. 452; E. C. L. R. 61.

ⁱ Upon the trial of an issue, whether a particular farm in the parish of S. N. was discharged of tithes on payment of a modus, after proof of an ineffectual search for the original endowment and appropriation, a book was produced, said to be an old ledger or chartulary of the abbey of Glastonbury, from the muniment-room of the Marquis of Bath (the owner of the abbey lands), containing entries, showing that at the time of those entries the small tithes were assigned to the vicar, no mention being made of any money modus; the book contained also other entries relating to the appropriation of the rectory and endowment of the vicarage. This book having been rejected on the trial, on a motion for a new trial its admissibility was objected to on two grounds: 1st, that it had not been shown to have belonged to the abbey of Glastonbury; and 2nd, that the evidence did not bear upon the facts in issue. But upon the first objection, the court was of opinion, that search having been made, as was admitted, in every place where the endowment itself might be expected to be found, and none being found, a copy was evidence. That such a book, containing a description of the estates of an abbey, and the transactions concerning them, would on the dissolution of the abbey, go to the officers of the Crown, and from them to the grantees under the Crown; and consequently, that the only possible way of showing the connection between the book and the abbey was by proving a connection between the possessor and the

was received, after proof that search had been made for the original, and that the practice of the office, at the date of the will, was to give out the original after making copies.^k And in the same case an old attested copy of a deed of settlement, produced from the proper custody, was received after proof of unsuccessful search for the original, and that the possession of the estates comprised in the settlement went with the copy.

After notice to the plaintiff to produce a letter, which he admitted to have received from the defendant, it was held, that an entry by a deceased clerk in a letter-book, professing to be a copy of a letter from the defendant to the plaintiff, of the same date, was admissible evidence of the contents, proof having been given, that according to the course of business, letters of business written by the plaintiff were copied by this clerk, and then sent off by the post;^l and Lord Ellenborough observed, that if such

Crown, by showing him to be in possession of lands which passed from the abbey to the Crown, and from the Crown to the grantee. That supposing the book to have been traced to the custody of the abbot, the account it contained of the particular matters of endowment was admissible, the endowment itself not having been found after search in the natural places of deposit; *Bullen v. Michell*, 2 Price, 399. Judgment was affirmed in the House of Lords, 4 Dow. 298. Lord Redesdale in giving his judgment, observed that as the original instruments would, if they could have been produced, have been admissible in evidence, the only question was, whether the entries in the book were evidence of the licence of appropriation and endowment. That they were admissible as the next best evidence that could be produced. The two instruments seemed, he said, to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the abbey, that the instruments might be preserved. And for the same reason it might be presumed that they were faithful copies; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept. See also 13 M. & W. 267; and *ante*, p. 528. A copy of a lost decree establishing manorial customs against the lord, and found amongst his papers, is secondary evidence of the decree against him, for its place of deposit shows that it was considered to be a copy; *Price v. Woodhouse*, 3 Ex. 616; but it is not evidence as an admission of the facts. So an office copy of a decree produced by the lord as evidence of the custom being lost, secondary evidence of that copy was admitted, *Ibid*.

^k 10 Cl. & F. 946.

^l *Pritt v. Fairclough*, 3 Camp. 305; in this case Lord Ellenborough laid stress upon the circumstance that the defendant had admitted the receipt of the letter, and might rebut the evidence by producing the original; but even if there had been no such admission, it seems that the evidence would have been admissible. So the copy of a letter, accompanied with a memorandum, in the handwriting of a deceased clerk, purporting that the original had been forwarded by him, was admitted as evidence, upon proof that this was his usual mode of transacting busi-

*evidence were not to be admitted, the most careful merchant
 *548] would be unable to prove the contents of a letter after the
 death of his entering clerk.

In proving the contents of a letter, it is not necessary to call the clerk who wrote the letter, although his testimony may be had. It is sufficient to prove it by any other witness who recollects the contents; for it is merely contingent whether the clerk who wrote the document would recollect its contents better than another person.^a Where a secretary had made entries of the licences granted by the governor of a colony, in a memorandum-book, on proof of loss of the licence, it was held that parol evidence might be given of the contents without producing the book, and that if the book were to be produced it could not be read in evidence, and would be of no use except to refresh the memory of the witness.^o

Where a licence from the Crown has been lost, the contents should be proved by the registry at the Secretary of State's office.^p

ness; *Hagedorn v. Reid*, 3 Camp. 370; see also *Roberts v. Bradshaw*, 1 Starkie's C. 28; E. C. L. R. 2; *Toosey v. Williams*, Mood. & M. 129; E. C. L. R. 22; *Lord Melville's case*, 29; Howell's St. Tr. 734 *Sturge v. Buchanan*, 10 A. & E. 598; E. C. L. R. 37; and *ante*, p. 494.

^a *Laebman v. Pooley*, 1 Starkie's C. 167; E. C. L. R. 2.

^o *Kensington v. Inglis*, 8 East. 273. In this case the entry in the memorandum-book does not appear to have been a copy of the document which the witness could have sworn to as such, but merely a memorandum of the fact that such a licence had been granted.

^p *Rhind v. Wilkinson*, 2 Taunt. 237. Or rather *may* be so proved; see *ante*, note (c). Upon the impeachment of Lord *Melville*, 29 How. St. Tr. 714, it was proposed to prove the contents of a letter of attorney, under which it was alleged that Mr. *Douglas* had been directed by Lord *Melville* to apply to the Treasury for moneys from time to time as his paymaster; and for this purpose the managers offered in evidence an entry in a book kept in the Exchequer, which book contained copies of all the letters of attorney for the receipt of money at the Exchequer. No such letter had been found after diligent search among Mr. *Douglas's* papers shortly after his death, but it was proved that an official order had been made out for Mr. *Douglas* to receive the money under a letter of attorney; and the fact of Mr. *Douglas's* appointment as paymaster was proved by a letter in Lord *Melville's* handwriting, and the clerk of the office proved that he had made the entry from an official letter of attorney. After argument, the entry was rejected. There is no legal proof (said the Lord Chancellor) of Lord *Melville's* handwriting, and it does not appear whether the attesting witnesses are living or dead; nor does it appear that Mr. *Douglas* ever received any money under that appointment. For these reasons it was determined that the managers had not entitled themselves to read the paper. Upon this the managers proceeded further, and tendered in evidence, a certificate signed by Mr. *Douglas* as paymaster, and

*In the case of *Bullen v. Michell*,^a it was held then an old ledger or chartulary of the abbey of Glastonbury was admissible as secondary evidence of a licence of appropriation and of the endowment of a vicarage, as between the vicar and occupier of a farm, upon the question whether the farm was discharged of tithes on payment of a modus. And it being considered that the book under the circumstances came from the proper repository, it was held, that *it afforded sufficient secondary evidence to prove the two instruments. The court said the two instruments seem to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the abbey, because it was important for the interests of the abbey that the instruments should be preserved. [*549 [*550

Where it was proved that the house of a party in whose custody marriage articles ought to have been, had been occupied and pillaged by rebels and foreign troops, and that after diligent search amongst his papers they could not be found, it was held that a recital of them, in a case submitted to counsel at the time, and charged for and entered as paid by the family attorney, was admissible as secondary evidence.^r

Where the plaintiff, on being called upon to produce a grant produced an ancient parchment, without either signatures or seals, it was held to have been rightly received, as a document coming out of given by him to the Navy-office, acknowledging the receipt of money by him at the Exchequer. The managers then produced entries in the Bank books, signed by Lord *Melville* and Mr. *Douglas*, in the common form of opening an account; and afterwards called a witness, whose name and description corresponded with the name and description of one of the attesting witnesses in the proposed entry; and this witness stated that he had some recollection, though very slight (for the entry bore date about twenty-four years before this time), of providing a stamp for the power of attorney from Lord *Melville* to Mr. *Douglas* and of attesting it at the Navy Pay-office. Upon this evidence the Lord Chancellor declared his opinion that the entry was admissible, and the Lords allowed it to be read. Where a surrender of a copyhold was stated to have been made by power of attorney, the court roll, stating that fact, is good secondary evidence of it; *Doe dem. Counsell v. Caperton*, 9 Car. & P. 112; E. C. L. R. 38. In the *Crawford and Lindsay Peerage case*, 2 H. of L. Cases, 547, copies of the Rotuli Scotiæ, printed by the Record Commissioners, were rejected, because it was not shown that the original roll was not extant.

^a 2 Pri. 299; *supra*, note (i). So in *Williams v. Wilcox*, 8 A. & E. 314, E. C. L. R. 35, a copy of a grant in an old chartulary was admitted as secondary evidence.

^r *Lord Lorton v. Gore*, 1 Dow, N. S. 190.

the hands of the opposite party, and not as a deed, nor as evidence of one.^a

Where an assignment had been lost before it had been entered of record, pursuant to the 6 Geo. IV., c. 16, s. 96, it was held that secondary evidence of it was admissible.^b

In proving an examined copy, it is sufficient to prove that whilst one read the original, the other read the copy.^c

If the deed or other instrument be in the possession of the adversary in a civil, or of the defendant in a criminal case, proof must be given of that fact;^{*} and it must next be shown that the adverse party, or his attorney, has *had notice to produce
*551] it.[†] It has been said that this rule applies, even where there is evidence to prove the destruction of the instrument.[‡] Proof of the delivery of a paper to the servant of the defendant without calling the servant, was in a criminal case held to be insufficient proof of the possession of the paper by the defendant.[§] But proof that a deed came into the hands of the defendant's brother, under whom the defendant claimed, was held to warrant the reading of a copy,^b even although the defendant had sworn, in an answer in Chancery, that he had not got the original. Proof of this kind

^a *Tyrwhit v. Wynne*, 2 B. & Ald. 554. It was held to be entitled to but little credit, since the acts of enjoyment had been inconsistent with it.

[†] *Giles v. Smith*, 1 Cr. M. & R. 462.

[‡] *Rolfe v. Dart*, 2 Taunt. 52. But see *Slane Peerage case*, 5 Cl. & F. 24, ante, p. 271. It might be admissible as secondary evidence in a case where an examined copy is not required.

^{*} Where it was sworn that the original lease had been stolen from the plaintiff by a party, at the instigation of the defendant, who either had it, or knew where it was, and there was no denial on the part of the defendant, the Court made a rule absolute, in order to enable the plaintiff to give secondary evidence of its contents; *Doe dem. Pearson v. Ries*, 7 Bing. 724, E. C. L. R. 20.

[†] *R. v. Stoke Golding*, 1 B. & Ald. 173; *Knight v. Marquis of Waterford*, 4 Y. & C. 284. In trover for goods, against a carrier who set up a general lien, evidence offered by the defendant, that bills delivered by him to the plaintiff contained a statement that all goods carried by the defendant were to be subject to such lien, was rejected without a notice to produce the bills; *Jones v. Tarleton*, 9 M. & W. 675; *Lawrence v. Clarke*, 14 M. & W. 250. Even in penal actions and criminal proceedings, notice to the defendant's attorney is sufficient; *Cates v. Winter*, 3 T. R. 306; *R. v. Watson*, 2 Starkie's C. 129; E. C. L. R. 3.

[‡] *Doe v. Morris*, 3 Ad. & El. 46; E. C. L. R. 30. This is confined to the case of destruction after it came into the adversary's possession, for he might dispute its destruction; *tamen quære*, *Foster v. Pointer*, post, note (u).

[§] *R. v. Pearce*, Peake's C. 75; *Gordon's case*, 1 Leach, 300.

^b *Pritchard v. Symonds*, Hereford Ass. 1744; B. N. P. 254.

must depend much upon the circumstances of the particular case.^c The fact of the adversary's possession may be proved by circumstances, and for this purpose the particular course of duty and office is admissible to raise a presumption of such possession.^d Presumptive evidence having been given *that the defendant had obtained his certificate under a commission of bankrupt, [*552 it was presumed that it was in the defendant's possession.^e So an appointment of an officer as an overseer is presumed to be in the possession of the officer.^f

Proof that a letter was sent to a party purporting to enclose a bill, and that a bill answering the description in the letter was shortly after in the possession of that party, was held to be presumptive evidence that he received both letter and bill.^g

Where an apprentice deed is cancelled by the master on payment of money, he is bound to deliver the indenture up to the apprentice.^h Documents relating to an estate *are presumed to have been delivered to an assignee.ⁱ The fact of a letter [*553

^c *Baldney v. Ritchie*, 1 Stark. C. 338; E. C. L. R. 2.

^d See *Hetherington v. Kemp*, 4 Camp. 193; *Hagedorn v. Reid*, 3 Camp. 370; *Toosey v. Williams*, Mood. & M. 129; E. C. L. R. 22. The defendant's clerk produced a letter-book, containing the copy of a letter in his handwriting; the course was, for the clerk to copy all such letters (to India), which, when copied, were delivered to the defendant to be sealed, and then carried by the witness or another clerk to the India-house; there was no particular place of deposit in the office for the letters to be so carried; both the clerks swore that they always carried the letters delivered to them for that purpose, but neither of them had any recollection of the particular letter. Lord Tenterden, with great reluctance, rejected the evidence, observing, that the practice differed from that in most counting-houses; and that, if the duty of the clerks had been to see the letters so copied carried to the post-office, it might have done, (see *Robb v. Starkey*, 2 Car. & K. 143; E. C. L. R. 61; *Eastern U. R. Company v. Symonds*, 5 Ex. 237,) but that there was something else to be done, and that by the defendant.

^e *Henry v. Leigh*, 3 Camp. C. 502.

^f An indenture of apprenticeship, made 1797, having been signed only by one overseer of the appellant parish, the respondent parish, to show that only one had been appointed in that year, called upon the appellants to produce the original appointment (having given them notice to produce all books and writings relating thereto); one book only was produced, and that was not for the year 1797. Held, that the respondents not having taken any means to procure the testimony of the overseer himself (who must be presumed to have the custody of the original appointment), were not entitled to give secondary evidence of its contents; *Rex v. Leicester*, 1 B. & Ald. 173.

^g *Kieran v. Johnson*, 1 Stark. C. 109; E. C. L. R. 2.

^h *R. v. Harberton*, 1 T. R. 141.

ⁱ *Goodtitle v. Saville*, 16 East, 91, n.; *Doe dem. Richards v. Lewis*, 20 L. J., C. P. 171.

having been sent to a deceased party several years before her death, was held to be insufficient to found a presumption that it was in the possession of her executrix.^j

A party after notice to produce a document, cannot get rid of it by transferring the possession of the instrument to another person before the trial, for this is *in fraudum legis*.^k

In some instances it is sufficient to show that the instrument is in the actual possession of one who is in privity with a party, for then the possession of the one is in law the possession of the other. Where the action was brought against the owner for goods supplied for the use of the vessel, and proof was given that the order for the goods was in possession of the captain, it was held that the proof of possession was sufficient.^l So for this purpose possession by the under-sheriff is possession by the sheriff.^m Possession by the banker of the party is possession by the latter.ⁿ

*554] A joint notice having been given to two executors, one of whom has suffered judgment by default, secondary evidence is admissible of a receipt proved to be in the possession of the latter.^o

This rule is inapplicable where the party to the suit has not a right to retain as well as inspect the document, as where it is not in the possession of a party in the cause, but of a stake-holder, between him and a third person;^p nor does it apply where the

^j *Drew v. Durnborough*, 2 Car. & P. 198; E. C. L. R. 12. But this case does not seem to have been decided with a view to the question of the admissibility of secondary evidence.

^k *Knight v. Martin*, 1 Gow, 26; E. C. L. R. 5; and see *Leeds v. Cook*, 4 Esp. C. 256, and *infra*, p. 562. But where notice had been given to the party, and upon a second trial was served upon the attorney, who informed the party serving it that the instrument had been assigned to some one whom he did not know, without his privity or knowledge, it was held that the service was insufficient without further inquiry from the defendant; *Ibid.* Where a party had notice to produce an instrument, and did not say he had not got it, although in fact he had delivered it at the Stamp-office, the adversary was permitted to give secondary evidence; *Sinclair v. Stephenson*, 1 C. & P. 582; E. C. L. R. 12. And see *Doe dem. Pearson v. Ries*, 7 Bing. 724; E. C. L. R. 20; *supra*, note (x).

^l *Baldney v. Ritchie*, 1 Stark. C. 338; E. C. L. R. 2.

^m *Taplin v. Atty. Ry. & Moo.* 164; E. C. L. R. 21; 3 Bing. 164; E. C. L. R. 11.

ⁿ *Partridge v. Coates*, Ry. & M. 156; E. C. L. R. 21. And see *Sinclair v. Stephenson*, 1 C. & P. 582; E. C. L. R. 12; *Burton v. Payne*, 2 C. & P. 520; E. C. L. R. 12.

^o *Beckwith v. Bonner*, 6 C. & P. 682; E. C. L. R. 25.

^p *Parry v. May*, 1 M. & Rob. 279.

party to the suit justifies under another who has possession of the paper in an independent character.⁴ But the fact that a judge has made an order on the plaintiff, to admit a certain document to be a true copy of a letter written by him to the defendant, will not enable the latter to give that copy in evidence, without proof that the plaintiff has the original in his possession, and has had notice to produce it.^r

The question whether possession of a document by the opposite party is sufficiently established is solely for the judge, and that party may interpose evidence upon that question to show that he has it not, which will not entitle the other side to any reply to the jury.^s

The instrument having been proved to be in the possession of the adversary, the next step is to prove the notice to produce it.¹

⁴ *Evans v. Sweet*, R. & M. 83; E. C. L. R. 21; and see *Pritchard v. Symonds*, B. N. P. 254; *R. v. Pearce*, Peake's C. 76. Where a party in possession of books, &c., belonging to a committee, of which he had been a member, had them delivered to him as a member of another society, which had subsequently occupied the same office; held that he could not be deemed to be so connected with the former as to let in secondary evidence of the contents, after notice to the defendants, his former coadjutors, he holding them in a new character (*per Tindal, C. J.*); *Whitford v. Tutin*, 6 C. & P. 228; E. C. L. R. 25; *S. C.*, 10 Bing. 395; E. C. L. R. 25.

^r *Sharpe v. Lamb*, 11 A. & E. 802; E. C. L. R. 39.

^s *Harvey v. Mitchell*, 2 M. & Rob. 366; *Smith v. Sleep*, 1 Car. & K. 46; E. C. L. R. 47. As to what is sufficient evidence, see *Robb v. Starkey*, 2 Car. & K. 143; E. C. L. R. 61. Such evidence, too, it would appear, being for the Judge, ought to be given on the *voir dire*; *Cleave v. Jones*, Hereford Summ. Ass. 1851, *coram Erle, J.*

¹ A refusal to produce books or papers upon notice given does not warrant the presumption that if produced they would show the facts to be as alleged by the party giving notice; the only effect is, that parol evidence of their contents may be given, and if such secondary evidence be imperfect, vague and uncertain as to dates, sums, &c., every presumption will be against the party who might remove all doubts by producing the higher evidence; *Life and Fire Ins. Co. v. Mechanics' Ins. Co.*, 7 Wend. 31. Parol evidence of the contents of a paper required to be produced on the trial of a cause cannot be given until its genuineness be established by proof, but if a paper is produced on notice, such proof is unnecessary; *McPherson v. Rathbone*, 7 Wend. 216. Where notice before suit brought is the foundation of action, parol evidence of its contents cannot be given until all proper measures have been fruitlessly taken to produce it; but when the notice relates merely to some collateral fact, parol evidence of its contents is admissible; *McFadden v. Kingsbury*, 11 Wend. 667. Where the plaintiff gave notice to the defendant to produce on the trial an original paper in his

*555] It is sufficient to prove service of notice to *produce a deed or other instrument either on the party or his attorney, in

possession, a copy of which was annexed to the notice, and it appeared by the testimony of witnesses that the supposed copy materially differed in one particular from the original: it was held that notwithstanding such differences the notice was sufficient to entitle the plaintiff to give parol evidence of the original, it being manifest from all the circumstances that the defendant must have understood what paper was intended to be referred to in the notice; *Bogart v. Brown*, 5 Pick. 18. But such copy annexed to the notice cannot be used in evidence by the party having the original in possession; and where a party refuses to produce an original paper in his possession, and thereupon the other party is permitted to give parol evidence of its contents, the party who has the possession of the paper will not be permitted to contradict such evidence, but he will be permitted to prove that no such paper ever existed, for the purpose of rebutting parol evidence of its contents; *Ibid.* He who has not and is not entitled to the possession of a deed or public paper cannot be compelled to produce it; *Denton v. Hill*, 4 Hayw. 73. Nor can a copy be given in evidence where the opposite party has produced the original under notice; *Dean v. Carnahan*, 7 Mart. N. S. 258. A party wishing to avail himself in evidence of a paper in the possession of the attorney of his adversary must give notice to produce it; he cannot have the benefit of the evidence by subpoenaing the attorney to produce it or compelling him to testify, if it was delivered to him by his client as supporting the action or defence; *McPherson v. Rathbone*, 7 Wend. 216; *Jackson v. Dennison*, 4 Wend. 558; *Lagen v. Patterson*, 1 Blackf. 328. A notice to the attorney of a defendant to produce on the trial a certain letter written by the plaintiff to the defendant concerning an execution which was produced on a former trial in the same cause and "all other papers in your custody or power relating to the matters in controversy in this cause," was held to be sufficiently explicit to apprise the attorney that the execution referred to in such letter was one of the papers which he was called upon and expected to produce, especially when it was shown that on such former trial the letter and execution had been produced by the defendant's attorney himself, who must have known that it was the principal paper wanted; *Ibid.* Where the pleadings in the case gives notice to a party to be prepared to produce a particular instrument at the trial, formal notice is not necessary; *Hammond v. Hopping*, 13 Wend. 505; *Utica Bank v. Hillard*, 5 Cow. 419.

A paper produced on notice to the adverse party must be proved by him who offers it in like manner as if he had himself produced it, unless the person producing it be a party to the instrument or claim a beneficial interest under it; *Rhoades v. Selin*, 4 Wash. C. C. R. 715. When a party calls for the account of his opponent and on its being produced reads it to the jury it may generally be considered as making it to some extent evidence; but when suit is brought on what is alleged to be the balance of an account which is disputed or where the defendant alleges that an account which he did not originally object to from ignorance or mistake, is erroneous, and calls for it expressly to disprove some of the items and the amount charged on each of them, and gives evidence to this effect the fact of his calling for it to disprove it, is not any evidence of its correctness; *Gracy v. Baily*, 16 Serg. & R. 126. Where notice has been given to a party to

criminal as well as civil cases.^b This must appear to be a reasonable notice.^c A notice to *produce a written in- [*556

^a *Attorney-General v. Le Merchant*, 2 T. R. 201; *R. v. Watson*, *ib.* 199; *Cates v. Winter*, 3 T. R. 306; *Trist v. Johnson*, 1 M. & Rob. 259; *R. v. Ellicombe*, *ib.* 260. The notice, it seems, ought to be served on the attorney in a cause, if there be one; *per Gurney, B., Houseman v. Roberts*, 5 C. & P. 394; E. C. L. R. 24. Where the attorney has been changed, a notice served on the first attorney, whilst he was the attorney, is sufficient; *Doe v. Martin*, 1 M. & Rob. 242. It is to be presumed that a party who goes abroad leaves with his attorney, who is to conduct the trial, all necessary papers; *Bryan v. Wagstaff*, R. & M. 327; E. C. L. R. 21; and perhaps this rule ought to be extended to cases of parties resident in England, where the document is necessarily connected with the cause, or the transaction in question; in *Affalo v. Fourdrinier*, M. & M. 335; E. C. L. R. 22; *e. g.*, the writ; *Gibbons v. Powell*, 9 Car. & P. 634; E. C. L. R. 38. But if the document be only accidentally connected with it, no such presumption is made in such a case; *Atkins v. Meredith*, 4 Dowl. 658; *Lawrence v. Clark*, 14 M. & W. 250; *Byrne v. Harvey*, 2 M. & Rob. 89; *Holt v. Miers*, 9 Car. & P. 191; E. C. L. R. 38. It is for the judge to determine whether the papers required to be produced were so necessarily connected with the cause as to render it probable that they would be delivered to the attorney; *per Lord Tenterden*, in *Vice v. Lady Anson*, M. & M. 97; E. C. L. R. 22. Thus, in an action against partners, the defence was that the bill had been accepted by one for his private debt, with the knowledge of the plaintiff. Held, that other bills accepted by that partner, and paid, were not so connected with the subject of the trial as to render a notice on the attorney to produce them (too late for him to obtain them for his client) sufficient to let in secondary evidence of them; *Affalo v. Fourdrinier*, M. & M. 334; E. C. L. R. 22; 6 Bing. 306; E. C. L. R. 19.

^b With respect to documents which may be presumed to be in England, it has been held, where the trial is to take place at the assizes, if the party and his attorney, or either of them, live in another town, a notice for the assizes should, in general, be served before the commission-day; *Trist v. Johnson*, 1 M. & Rob. 259. Upon an indictment for arson, when the commission-day was on the 15th, notice was served on the prisoner in gaol on the 18th, and the trial was on the 20th, the notice was held to be too late; *R. v. Ellicombe*, 5 C. & P. 522; E. C. L. R. 24. Notice to a prisoner to produce a deed after the commencement of the assizes, at which he was tried for felony, was held to be insufficient; *R. v. Haworth*, York Lent Assizes, 1830, *cor. Parke, J.* Notice by the plaintiff was served on Saturday, in Essex, to produce a deed on a trial at the assizes which commenced on the following Monday; the attorney went to London and fetched the deed; a notice was served on the Monday evening to produce another deed; the attorney offered to procure it, if the plaintiff would pay the expense; no offer of payment was made. The trial was on Thursday: it was held, that the plaintiff was not entitled

produce books or papers on the trial of the cause, and he is sworn, and states that the books or papers required are not in his possession, he cannot be examined by the counsel generally as to the merits or gist of the cause. The case does not resemble in this respect that of a bill of discovery in chancery; *Wood v. Connell*, 2 Whart. 542.

*557] strument is usually in writing, but it *may, it seems, be by

to give secondary evidence of the latter deed (*Doe v. Spitty*, 3 B. & Ad. 182; E. C. L. R. 23); for the defendant was not bound to permit the deed to be sent by a coach, the plaintiff refusing to pay for a special messenger. Service on the attorney at the assize town on Monday evening to procure a book which was both actually and presumably at his residence nineteen miles off, the cause being tried on Wednesday, is not sufficient. *Hargist v. Fothergill*, 5 C. & P. 303; E. C. L. R. 24. So where it was served on the defendant's attorney at his residence twenty miles from the place of trial, at eight in the evening before the trial, and the defendant resided in the same town as the attorney, but was not at home till twelve o'clock; *Howard v. Williams*, 9 M. & W. 728. A. and his attorney lived, the one fourteen, and the other twenty miles from the assize town. At noon on the commission-day the attorney was served at the assize town with notice to produce a paper. The trial came on next morning. In fact the paper was then at the assize town in the possession of M., a former attorney for the defendant, who had a lien on it as such attorney, and the fact that he had it was mentioned in the notice to produce. It was held that secondary evidence might be received; *R. v. Hawkins*, 2 C. & K. 823; E. C. L. R. 61. In an action on a bond tried at the Flintshire assizes, the commission-day was the 27th; the cause was tried on the 29th. At 10 A. M., on the 28th, notice to produce the bond was served on defendant's attorney at Mold, in the defendant's presence. The attorney resided in London. In fact the bond was in the possession of W., who was the defendant's general attorney, and who had undertaken to produce it, if bound so to do. Before the assizes he had sent the bond to the defendant's attorney in the action, in London, for inspection and admission under a judge's order, where the plaintiff's attorney had copied it. At the trial W. had the bond in court, but objected to produce it on the ground of privilege, and the objection was allowed. Held, that the notice to produce was sufficient, and that the copy was admissible; *Lloyd v. Mostyn*, 10 M. & W. 478. The commission-day being on Thursday, notice was served on the plaintiff's attorney, who, as well as the plaintiff, lived in the assize town, to produce some bills, and the cause was tried on the Monday. This was held sufficient; *Firkin v. Edwards*, 9 Car. & P. 478; E. C. L. R. 38.

With respect to town causes, service of notice upon the wife of the attorney of the defendant, late in the evening of the night before the trial in London, was held to be insufficient; *Doe v. Guy*, 1 Stark. C. 283; E. C. L. R. 2. So was the service at seven in the evening of the day before the trial, at the office of the attorney, who had then left his office; *Sims v. Kitchen*, 5 Esp. C. 46; S. P. *Atkinson v. Carter*, 2 Ch. 403; *Holt v. Miers*, 9 Car. & P. 191; E. C. L. R. 38. But in *Leaf v. Butt*, 1 Car. & M. 451; E. C. L. R. 41; a notice served on the defendant's attorney in the Strand, at seven o'clock the evening before the trial, to produce a letter applying for payment of the debt, addressed to the defendant, who lived in the Edgeware Road, was held sufficient by Alderson, B., after consulting the other judges; and so in *Meyrick v. Woods*, *ibid.* 452, a notice to produce a letter demanding compensation, served on the defendant in Duke street, Manchester Square, and his attorney in Seymour street, Bryanston Square, at half past six on the evening before the trial, was held by the same learned judge sufficient. And even though the case had been part heard, and adjourned till next day at 10 o'clock A. M., a notice served on the plaintiff's attorney before nine o'clock in the evening,

parol;* and then it may be proved *by any witness who heard the notice given.[†] The usual course is, as well in the [*558 case of notices to produce documents upon the trial, as in giving notice to quit, or notice of the dishonour of a bill of exchange, to make out duplicate notices, and the witness who serves one compares them with each other, and upon the trial proves their correspondence, and the delivery of one of them to the attorney of the opposite party.[‡]

to produce a letter from the defendant to the plaintiff, was held to be in time; *Sturm v. Jaffier*, 2 Car. & K. 442; E. C. L. R. 61. So, in *Gibbons v. Powell*, 9 Car. & P. 634—E. C. L. R. 38—a notice served on defendant's attorney at half-past seven the night before to produce the writ. Where, however, under the circumstances, it cannot be presumed that the document (*e. g.* a tradesman's book) is in the possession of the attorney, notice to the attorney on the preceding evening is insufficient, although the client reside in London; *Atkins v. Meredith*, 4 Dowl. P. C. 639. So in an action on a bill of exchange, to which there was a plea of fraud and covin, notice by the defendant to produce the bill, left in the letter-box of the office of the plaintiff's attorney at half-past eight in the evening before the cause was tried, the office and the plaintiff being both in London, was held to be too late; *Lawrence v. Clarke*, 14 M. & W. 250. It was also held that the plaintiff was not bound to produce it without notice; *Ibid.* So, where notice was given to produce a letter not obviously connected with the cause; and the service was too late to enable the attorney to communicate with his client, secondary evidence was rejected; *Byrne v. Harvey*, 2 M. & Rob. 89. If the document be abroad, notice should be given in sufficient time to enable the party to procure it; thus a notice served on a partner in a firm carrying on business in India, who had no place of business in London, to produce a letter relating to the partnership business, served in London on 3rd February, the trial being at the Spring Assizes, was held insufficient to entitle a party to produce secondary evidence; *Ehrensperger v. Anderson*, 3 Ex. 148. But in *Drabble v. Donner*, Ry. & M. 47—E. C. L. R. 21—a notice to produce letters written to the defendant (a foreigner) ten years before, at his residence abroad, served on the 10th, for the trial on the 14th, was held sufficient; the defendant having come to England eight months before, where he had remained ever since. So in *Sturge v. Buchanan*, 10 Ad. & E. 598—E. C. L. R. 37—a notice four days before the trial to produce letters written by the defendant to his partner in Australia was held good, long-pending litigation between the parties having rendered it probable that they must have been transmitted to this country. A statement, however, by the party served, that the paper is not in existence, does away with all objection as to insufficient notice; *Foster v. Pointer*, 9 Car. & P. 718; E. C. L. R. 38.

* *Smith v. Young*, 1 Camp. 440. If both a written and oral notice have been given, proof of either will suffice; *Ibid.*

† *Sturtees v. Hubbard*, 4 Esp. C. 203.

‡ *Jory v. Orchard*, 2 B. & P. 41. See Vol. II. tit. NOTICE. Where a great number of impressions are printed at the same time, they are in the nature of duplicate originals. See *R. v. Watson*, 2 Stark. C. 129; E. C. L. R. 3; where it

It is a general rule that proof of notice to produce a notice is not requisite; if it were, the necessity would extend *in infinitum*, as each additional notice to produce the preceding would require the same proof.^a But the case is different, where the notice has been given to a third person, and would not therefore be in *559] the possession of the *party,^b or where the notice has been given to the party, but the nature of the issue is not such that the defendant must know that the plaintiff will give secondary evidence, unless the defendant produces it.^c

The notice will be insufficient if it be entitled in a wrong cause. In an action by the plaintiffs *A.* and *B.*, assignees of *C.* (a bankrupt) v. *E.*, a notice to produce a document was entitled *A.* and *B.* assignees of *C.* and *D.* v. *E.*, and this was held to be insufficient, although *A.* and *B.* were in fact the assignees of *C.* and *D.* under a joint commission.^d But if, though inaccurate, it could not have been misunderstood, it will be sufficient.^e The notice should also afford sufficient information as to what is really required, and not be too vague and general.^f

was held that a number of copies of a placard having been printed by order of the prisoner, who had taken away twenty-five of them from the printers, one of the remainder might be read without giving notice to the prisoner to produce the twenty-five. And see *R. v. Pearce*, Peake's C. 75.

^a *Kine v. Beaumont*, 3 B. & B. 288; E. C. L. R. 7; *Colling v. Treweek*, 6 B. & C. 398; E. C. L. R. 13; *Swaine v. Lewes*, 2 C. M. & R. 261; *Doe dem. Fleming v. Somerton*, 7 Q. B. 58; E. C. L. R. 53. See Vol. II. tit. NOTICE.

^b *Grove v. Ware*, 2 Stark. C. 714; E. C. L. R. 3; *Robinson v. Brown*, 3 C. B. 754; E. C. L. R. 54.

^c *Ibid.*; *Lanauze v. Palmer*, M. & M. 31; E. C. L. R. 22. In this case the plaintiff in an action on a bill sought to give evidence of notices of dishonour of other bills, sent to the defendant in order to show he was aware of their existence, and that the indorsement of the bill in question, which was similarly indorsed, was not a forgery.

^d *Harvey and others v. Morgan*, 2 Stark. C. 17; E. C. L. R. 3; *cor.* Lord Ellenborough; and afterwards by the Court of King's Bench, on motion for a new trial, on the ground that the notice was sufficient, and that secondary evidence ought to have been admitted.

^e *Bittleston v. Cooper*, 14 M. & W. 399; *Lawrence v. Clarke*, 14 M. & W. 250, where it was entitled in the wrong court.

^f In an action for work and labour done as a singer, notice had been given to the defendant to produce all letters, papers, books, receipts, vouchers, memorandums, and all other documents written by the plaintiff to the defendant, or by the defendant to the plaintiff, or otherwise; and it was held to be sufficient to warrant parol evidence of a memorandum, signed by the defendant and delivered to a witness, and afterwards re-delivered to the defendant, stating the terms of engage-

*Where a document is produced in consequence of notice, and part is read, the party who produces it is, in general, [*560 entitled to have the whole read;^g but where notice was given to produce a letter which expressed that it covered several inclosures, but without referring to them particularly, it was held that the party producing the letter was not entitled to have the inclosures read.^h

It is to be observed, that notice to produce a document in the hands of an adversary does not make it evidence for him, unless the instrument be called for,ⁱ although the omission to call for it after notice may raise a presumption unfavourable to the party who gave the notice.^k [*561 *But if the party giving notice

ment; *Jones v. Hilton*, Lancaster Spring Ass. 1825, *cor.* Holroyd, J. Notice to produce "letters and copies of letters, also all books relating to this cause," was held to be too general, and insufficient to let in secondary evidence of the contents of letters; *Jones v. Edwards*, 1 M'Clel. & Y. 139. So a notice to produce "all letters, papers, and documents touching and concerning the bill of exchange mentioned in the declaration," is too general, not pointing out the particular letter required; *France v. Lucy*, R. & M. 341; E. C. L. R. 21. But a general notice to produce all letters written by the said *plaintiff* to the said defendant relating to the matter in dispute, was held sufficient to let in secondary evidence of a particular letter, although the date was not specified, because the notice did specify the names of the parties by and to whom the letters were addressed; *Jacob v. Lee*, 2 M. & Rob. 33. Notice served by the defendant on the plaintiff to produce "all letters written to and received by you between the years 1837 and 1841 from the defendant, or any person on his behalf," was held sufficient without specifying the dates of particular letters; *Morris v. Hannen*, Car. & M. 29; E. C. L. R. 41; *Morris v. Hauser*, 2 M. & Rob. 392, *S. C.* In *Rogers v. Custance*, 2 M. & Rob. 179, where a number of small accounts of the work had been delivered from time to time, the court held that a notice to produce "all books, extracts, letters, accounts and copies of letters and accounts, papers and writings relating to the matters in question in the cause" was sufficient to let in secondary evidence of one of the accounts, observing that much must depend on the particular circumstances of each case; and the question was whether the party must have been aware that this account was required.

^g *Infra*, pp. 579, 580. But see *ante*, p. 235.

^h *Johnson v. Gilson*, 4 Esp. C. 21; *Sturge v. Buchanan*, 10 Ad. & E. 598; E. C. L. R. 37. And where a shop-book was produced, in pursuance of notice, it was held that the party who produced it was not entitled to read other entries in the book, which had no reference to those which had been read by the adversary; *Whitfield v. Aland*, 2 Car. & K. 1015; E. C. L. R. 61.

ⁱ *Sayer v. Kitchen*, 1 Esp. C. 210. Nor even although called for, unless it be inspected or otherwise used. See *infra*.

^k *Per* Lord Kenyon, *ib.* In general, however, there is little to presume in such a case; it is usual in practice to give a general notice to produce books, &c., but it would be impolitic to call for them, unless something were known as to their contents.

call for it, and inspect it, he makes it evidence, although he does not read it.¹

It is also a general rule that a defendant, although he has given notice to his adversary to produce a particular document, cannot insist upon the production, or give parol evidence of the contents. until the plaintiff's case has been closed.^m

The reason for giving notice, and the necessity for giving it, cease when, from the very nature of the suit or prosecution, the party must know that he is charged with the possession of the instrument. Consequently, in an action of trover for a bond or note, parol evidence of the instrument may be given, although no previous notice to produce it be proved;ⁿ and in a prosecution for *562] stealing *such an instrument, the same rule applies.^o So also in trials for treason, where the prisoner has been

¹ *Wharam v. Routledge*, 5 Esp. C. 235; *Calvert v. Flower*, 7 C. & P. 386; E. C. L. R. 32. But see *Wilson v. Bowie*, 1 C. & P. 8; E. C. L. R. 12.

^m *Graham v. Dyster*, 2 Stark. C. 23; E. C. L. R. 3; *Sideways v. Dyson*, *ibid.* 49. On the cross-examination of one of the plaintiff's witnesses, the defendant's counsel required the production of the plaintiff's books, notice having been given for that purpose. The plaintiff refused to produce them in that stage of the business, before the defendant had gone into his case. The defendant's counsel then proposed to give parol evidence of the entries; but Lord Ellenborough said that, in strictness, the evidence could not be anticipated, although it was rigorous, to insist upon the rule, and a close adherence to it might be productive of inconvenience.

ⁿ *Scott v. Jones*, 4 Taunt. 865; *How v. Hall*, 14 East, 274; *Jolley v. Taylor*, 1 Camp. 143; *Butcher v. Jarratt*, 3 Bos. & Pull. 143; *Wood v. Strickland*, 2 Mer. 461; *Whitehead v. Scott*, 1 M. & Rob. 2; *Colling v. Treweek*, 6 B. & C. 398; E. C. L. R. 13. But in an action on a check, with a plea that it was won by playing at an unlawful game, the defendant cannot give secondary evidence of it without notice to produce it; *Read v. Gamble*, 10 Ad. & E. 597; E. C. L. R. 37. A plea to an action by the drawer of a bill against the acceptor, that he accepted in part payment of a debt owing by him to the plaintiff to induce him to prove his debt under a fiat against the defendant, which acceptance in part payment of such debt is denied in the replication, does not give the plaintiff such notice that the bill will be called for as to dispense with notice to produce; *Goodered v. Armour*, 3 Q. B. 956; E. C. L. R. 43. Neither does a plea that the defendant's acceptance was obtained by fraud; *Lawrence v. Clarke*, 14 M. & W. 250. Where usury is stated to have been committed in discounting the bill upon which the action is brought, and another bill in one undivided transaction, no parol evidence is admissible as to the contents of the latter, unless notice has been given to produce it; *Hattam v. Withers*, 1 Esp. C. 259; *coram* Lord Kenyon, C. J., 1795. In equity each party knows previously what evidence has been given, and therefore there is not the same necessity for notice.

^o *R. v. Aickles*, 1 Leach, C. 391. So on an indictment for forging a bill of ex-

proved to be in possession of the original document containing the treasonable matter.^p In an action for breach of promise of marriage, it appeared that a witness who had been served with a *subpœnâ duces tecum* to produce a letter written by the plaintiff to the witness, had, since the commencement of the action, delivered it to the plaintiff; and although no notice had been given to produce it, Lord Ellenborough admitted evidence of the contents, since the document belonged to the witness, and had been subtracted in fraud of the *subpœna*; it was therefore admissible as *in odium spoliatoris*.^q Where proof had been given that a conspirator in a case of high treason, had procured the possession of certain printed placards, it was held that they were duplicate originals, and that one might be read in evidence without notice to produce the *original.^r Where a party at a public meeting delivered to [563 a person a written paper, as a copy of the resolutions about to be read, and which corresponded with the resolutions so read, it was held to be good evidence to prove the resolutions, without previous notice to produce the paper from which the resolutions were read.^s Notice is in general unnecessary, where a duplicate original can be proved.^t Proof that the adversary or his attorney

change, which the prisoner had swallowed; *R. v. Spragge*, cor. Buller, J., on the Northern circuit, cited by Lord Ellenborough in *How v. Hall*, 14 East, 274; *Butler's case*, 13 Howell's St. Tr. 1250.

^p *Francis's case*, 15 Howell's St. Tr. 941. In *R. v. Moors*, 6 East, 419, n., upon an indictment for administering unlawful oaths, a witness swore to the terms of one spoken by the prisoner whilst he held a paper in his hand, and it was held that notice to produce the paper was unnecessary. And so it is generally, without resorting to the principle now under consideration, where evidence is given of what the party has *said*. And see *R. v. Layer*, 16 Howell's St. Tr. 220; *R. v. De la Motte*, East, P. C. 124. The letters in the latter case had been opened at the post-office.

^q *Leeds v. Cook*, 4 Esp. C. 256; *Doe v. Ries*, 7 Bing. 724; E. C. L. R. 20.

^r *R. v. Watson*, 2 Stark. C. 129; E. C. L. R. 3. A copy of a letter taken by a copying machine is not evidence without notice to produce the original; *Nodin v. Murray*, 3 Camp. 228; *Holland v. Reeves*, 7 C. & P. 36; E. C. L. R. 32. Otherwise with notice, the witness producing the copy stating that he worked the machine, although he had not compared it with the original; *Simpson v. Thoreton*, 2 M. & Rob. 433.

^s *R. v. Hunt*, 3 B. & Ald. 572; E. C. L. R. 5.

^t See Vol. II. tit. NOTICE; *Colling v. Treweek*, 6 B. & C. 398; E. C. L. R. 13; per Bailey, J.; *Philipson v. Chase*, 2 Camp. 110, per Lord Ellenborough. The copy of a bill delivered by an attorney to his client is evidence, without notice to produce the original; *Anderson v. May*, 3 Esp. C. 167. And the Court of C. P. refused a rule for a new trial; 2 Bos. & Pul. 237; *Colling v. Treweek*, 6 B. & C.

has the deed or other instrument in court, was formerly held not to supersede the necessity of notice; for the object of the notice, it was said, was not merely to enable the party to bring the instrument, but also to provide such evidence as the exigency of the case might require to support or impeach the instrument.¹ But in *564] a recent case it was *held by Pollock, C. B., after consulting the judges in the Exchequer Chamber, that the attorney of the adversary having the instrument in court, and refusing to produce it, secondary evidence might be given of it, though no notice to produce had been served.^{uu1}

394; E. C. L. R. 13. But where no such part has been kept, and no notice has been given, the plaintiff cannot state the items of the bill from his books; *Philipson v. Chase*, 2 Camp. 110.

^u See *Doe v. Grey*, 1 Stark. C. 283; E. C. L. R. 2; and *Roe v. Harvey*, 4 Burr. 2484. In debt for rent by the assignee of the lessor against the assignee of the lessee, the plaintiff's attorney being called to prove the execution of the deed, having on cross-examination admitted that, after the execution, some other deed had been executed between the original parties, but which he declined producing, though in court, the court expressed their opinion that there having been no notice to produce, parol evidence could not be given of the contents of the deed; *Bate v. Kinsey*, 1 C. M. & R. 38. So, it has been said, if the document be shown to have been delivered to the adversary, its contents cannot be proved without notice to produce, upon showing it to have been lost or destroyed. Thus, in ejectment, the defendant having admitted the title as heir and proved a will, duly executed, held that the plaintiff, not having given notice to produce, could not ask a witness whether the deceased had not a fortnight after, in the presence of himself and others, signed another paper and declared it to be his last will; and such latter paper having been traced to the possession of the defendant, the court said that secondary evidence could not be given of it without notice to produce, even though it was proved to have been lost or destroyed; *Doe v. Morris*, 3 Ad. & E. 46; E. C. L. R. 30.

^{uu} *Dwyer v. Collins*, Ex. Sitt. after H. T., 1852. Action on bill, plea, given for a racing bet. No notice had been given to produce the bill, but the plaintiff's attorney was in court, and being called by defendant, refused to produce it; whereupon Pollock, C. B., held that *the attorney* was compellable to state its contents.

¹ Notice to produce is not necessary when the defendant has notice that the plaintiff means to charge him with the possession of the paper, as in trover for a bond: where the party had fraudulently obtained possession of a written instrument belonging to a third person; and perhaps when it appears that the writing is in court and the party refuses to produce it; *Pickering v. Myers*, 2 Bailey, 113; *Gray v. Kernahan*, 2 Rep. Const. Ct. 65; *Commonwealth v. Messinger*, 1 Binn. 273; *Milliken v. Barr*, 7 Barr. 23; *Brown v. Isbell*, 11 Alabama, 1009; *Edwards v. Bonneau*, 1 Sandf. Sup. Ct. Rep. 610; *Nealley v. Greenough*, 5 Foster, 325. A notice given at the bar during the progress of a trial, to produce a paper, is not sufficient unless it appears satisfactorily that the paper is in court at the time, and

A counterpart, which is not a duplicate original, having been executed by one party only, is admissible against the party who executes it, to prove the execution of the other part which it recites, although no notice has been given to produce the original.^v But as against a third person, unless he claim in privity,^w a counterpart cannot be read in evidence without accounting for the want of the original, or proving it to be in the possession of the party, and that he has had notice to produce it.^x

*After proof of notice, the adversary either produces the instrument or he does not. If he does produce it, the execution must be proved in the usual way, by means of the attesting witness. This is now settled,^y although it was formerly held, that

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^v *Burleigh v. Stibbs*, 5 T. R. 465. The declaration alleged that *A. B.* put himself apprentice to the defendant by a certain indenture executed, &c.; and it was held that this was proved by the proof of that part of the indenture executed by the defendant, and in which it was recited that *A. B.* had bound himself apprentice to him. So, in ejectment, on a clause of re-entry for a forfeiture for non-payment of rent, against an assignee of the lease, proof of the counterpart, executed by the original tenant, is sufficient evidence of his holding on the same terms: *Roe v. Davis*, 7 East, 363; *Mayor, &c., of Carlisle v. Blamire*, 8 East, 487; and see *Pearse v. Morrice*, 2 Ad. & E. 84; E. C. L. R. 29.

^w 7 East, 363; 8 East, 487; and see 3 Q. B. 622; E. C. L. R. 43.

^x *Anon.* Salk. 287; *Anon.* 6 Mod. 225; *per* Grose, J., *R. v. Middlezoy*, 2 T. R. 41. But in order to prove that the ancestor of the lessor of the plaintiff had been seised of the land in question, a counterpart of a lease thereof, purporting to be made by that ancestor, and appearing to be executed by a party therein named as lessee, and found in the muniment room of the lessor of the plaintiff, was held admissible, although there was no privity between such apparent lessee and the defendant; *Doe dem. Egremont v. Pulman*, 3 Q. B. 622; E. C. L. R. 43; *Garrett v. Lister*, 1 Levinz, 25.

^y *Gordon v. Scretan*, 8 East, 548. An indorsement on a deed of feoffment of livery of seisin, as having been made by a deceased person and attested, was produced by the defendant in ejectment for the land. It was held inadmissible, without calling the attesting witness, as the defendant did not claim under it; *Doe v. Marquis of Cleveland*, 9 B. & C. 869; E. C. L. R. 17. Where ship's articles came out of the hands of the adverse party upon notice, the subscribing witness must be called; but in the case of actions by seamen, their contents may be proved without producing them, or notice to produce them; 13 & 14 Vict. c. 93, s. 52;

in possession of the party upon whom demand is made, or if elsewhere that it would be easy of access; *Atwell v. Miller*, 6 Maryland, 10. If two letters are written at the same time to the same person, one being the exact counterpart of the other, one being sent to the person addressed and the other retained by the writer, each is an original, and the one retained may be put in evidence by the party who retained it, without notice to the opposite party to produce the other; *Hubbard v. Russell*, 24 Barbour, 404.

where the deed or other instrument came out of the adversary's possession, no proof of execution was requisite.²¹ In *Gordon v. Secretan*,^a where the plaintiff in an action on a policy of insurance produced an agreement between himself and a stranger to the defendant, in pursuance of notice from the defendant, in order to show that the plaintiff had no interest in the subject-matter insured, it was held that the defendant was bound to prove the execution of the agreement by means of the subscribing witness. In the subsequent case of *Pearce Hooper*,^b it was held that if the party produc-

Johnson v. Lewellen, 6 Esp. C. 101. The general rule extends to agreements *not under seal*; *Whetherston v. Edgington*, 2 Campb. 94; and see *Cooke v. Stocks*, Tidd, 9th ed. 487; *Bateman v. Phillips*, 4 Taunt. 157; *Taylor v. Osborne*, cited 4 Taunt. 159-61, 162. The object of the party who means to use the instrument is not material; *Carr v. Burdiss*, 1 C. M. & R. 782.

^a *R. v. Middlezoy*, 2 T. R. 41; *Doxon v. Haigh*, 4 Esp. C. 109.

^b 8 East, 584.

¹ 3 Taunt. 60. In an action to recover a deposit for the purchasing of an estate the plaintiff need not prove the contract of sale produced by the vendor; *Bradshaw v. Bennett*, 1 M. & Rob. 143. So where the defendants claimed title to the goods for the conversion of which the action was brought, under a deed of assignment, and produced it at the trial under notice, it was held that it might be read against them without proof of execution, although the plaintiffs denied its validity on the ground of fraud; *Carr v. Burdiss*, 1 C. M. & R. 785. So where the defendants, assignees of a bankrupt, produced, under a notice from the plaintiff (in an action for use and occupation, (the deed of assignment of the bankrupt's effects; it was held, that the deed was admissible in evidence, though not proved by the attesting witness, it having been shown that the defendants occupied under the deed; *Orr v. Morrice*, 3 B. & B. 139; E. C. L. R. 7. In an action for work and labour, the defendant produced an agreement, signed by the plaintiff only, and attested, and Bayley, J., held, that proof by the attesting witness was unnecessary; *Mann v. Musgrave*, York Spring Ass. 1828. So in an action by a servant against his master for not employing him every working day, and paying him during a year which had not expired, with a plea of *non assumpsit*, the plaintiff produced upon notice the agreement between him and defendant; and Cresswell, J., held that the plaintiff claimed an interest under it, and that the attesting witness need not be called; *Bell v. Chaytor*, 1 C. & K. 162; E. C. L. R. 47. So where the plaintiff agreed in writing to erect hustings for the defendant for 19l. 10s., receiving the wood back and finding labour, and the hustings were destroyed by a mob, the defendant being sued for not restoring the wood produced on notice the agreement. It was held that the subscribing witness need not be called; *Fuller v. Patrick*, 18 L. J., Q. B. 236. In an action by a lessee against his assignee of a lease, the plaintiff having proved the execution of the counterpart,

¹ A paper produced, on notice, by the adverse party, must be proved by him who offers it, in like manner as if he had himself produced it, unless the party producing it be a party to the instrument or claim a beneficial interest under it; *Rhoades v. Selin*, 4 Wash. C. C. 715.

ing *a deed upon notice was possessed of a beneficial interest under it, proof of the execution of the deed by his adversary [*566 was necessary. In that case the defendant in trespass called for the deed which conveyed an estate to *the plaintiff, and [*567 which by its description of the extent excluded the *locus in quo*; and the court held, that since the plaintiff would have no interest in the estate if the deed did not convey it, the production of the deed was, against himself, good evidence of its execution. The court, however, in this case, admitted the general doctrine expounded in *Gordon v. Secretan*, and assented to the case put there by way of illustration, of an heir at law who produces a will upon notice given by a devisee named in the will. So where both parties claim an interest under the instrument so produced, such proof is unnecessary.^c As where the plaintiff claims under the original lessee, and the defendant under the assignment.^d An admission by the attorney of the party in possession of the deed before the trial, that the party claims under the deed, has been held to be sufficient.^e But the interest under a deed in the party producing it, which renders its proof by the attesting witness unnecessary, must be an interest claimed by him in the cause.^f A party also is not

the original being in the defendant's possession, it was held that it was unnecessary for the plaintiff to prove the execution of the original on its production by the defendant; *Burnett v. Lynch*, 5 B. & C. 589; E. C. L. R. 11. Where the attorney of the lessors of the plaintiff obtained from a lessee and defendant, the lease to the latter, in order to prevent the lease from being set up as a defence, and afterwards obtained an authority from that lessee to detain the lease; it was held, that on the lease being produced at the instance of the defendant no proof was necessary. For the lessors of the plaintiff were to derive a benefit from the possession of the lease, and the conduct of their attorney amounted to a recognition of the lease as a valid instrument; *Doe v. Heming*, 6 B. & C. 28; E. C. L. R. 13.

^c *Doe v. Wilkins*, 2 N. & M. 434; E. C. L. R. 28.

^d *Knight v. Martin*, 1 Gow, 26; E. C. L. R. 5.

^e *Roe v. Wilkins*, 4 Ad. & E. 86; E. C. L. R. 31; *Knight v. Martin*, Gow, 26; E. C. L. R. 5. See *Doe v. Heming*, *supra*. As to admissions by an attorney, see Vol. II. tit. ATTORNEY—ADMISSIONS. Such an admission, if untrue, would operate to the deception of the party to whom it was made.

^f *Rearden v. Minter*, 5 M. & G. 204; E. C. L. R. 44. In this case the plaintiff claimed commission from the defendant as his agent in procuring him an apprentice. The defendant produced the apprenticeship-deed under notice to do so. It was held that the case did not fall within the exception to the rule requiring the execution to be proved, the defendant not claiming in that cause any interest under the deed. So where the defendant, to prove that he had been in partnership with the plaintiff, offered a written contract in evidence purporting to be made by him and the plaintiff, as partners, with K. a builder, for work to be

*568] entitled *to read a deed in evidence without the usual proof, on the mere ground of its coming out of the possession of the adversary, except where the deed is produced by the adversary upon the trial of the cause.⁵ Where a deed had been received from the possession of the adversary, and remained in the possession of the party producing it for some months previous to the trial, who might therefore have been prepared to prove the execution, it was held that it could not be read without the ordinary proof.^h A parchment coming out of the adversary's possession without either signature or seal, may be read as a document coming out of the adversary's possession, but not as a deed.ⁱ Another exception to the general rule is that of a public officer, such as a sheriff, who produces an instrument, the execution of which he was bound to procure; as against him, it is presumed to have been duly executed.^k

If the adversary does not produce it, proof must then be given,
*569] as in case of the loss of the deed.^l But it has been *said that slighter evidence will suffice, where the deed is in the

done by *K.* upon the premises where the plaintiff carried on the business in which the partnership was alleged to have subsisted, the contract being in the plaintiff's custody was produced by him on notice, but it was held inadmissible without proof of the execution; *Collins v. Bayntun*, 1 Q. B. 117; E. C. L. R. 41.

⁵ *Vacher v. Cocks*, 1 B. & Ad. 144; E. C. L. R. 20.

^h 1 B. & Ad. 144; E. C. L. R. 20: And in *Carr v. Burdis*, 1 C. M. & R. 782, Parke, B., observed, that if the deed had been given up before the action, it might have made a difference.

ⁱ *Roe v. Rawlings*, 7 East, 291; *Tyrwhitt v. Wynne*, 2 B. & Ald. 554.

^k *Scott v. Waithman*, 3 Stark. C. 168; E. C. L. R. 3; *Barnes v. Lucas*, Ry. & Mood. 264; E. C. L. R. 21; *Plumer v. Brisco*, 11 Q. B. 46; E. C. L. R. 63.

^l *Sir Edward Seymour's case*, 10 Mod. 8. On the sale of premises to the defendant's landlord, a feoffment had been delivered by the vendor; the question was as to the premises sought to be recovered by the lessor of plaintiff being parcel of the premises so conveyed; notice had been given to produce the feoffment, which not being done an abstract thereof was tendered, there being no proof of any copy ever having existed. Held, that it was admissible without calling the attesting witness; and that it not being necessary to prove the feoffment, neither was it necessary to prove the livery of seisin; *Doe v. Wainwright*, 5 Ad. & E. 520; E. C. L. R. 31. The party seeking to prove the contents of a document in the adversary's possession, cannot compel him to produce it on the trial; all he can do is to give notice to produce the document; and, if he omit to do so, the only consequence is that the party seeking to give such evidence is entitled, after proof of possession by the adversary, to give secondary evidence of the contents; see *Entick v. Carrington*, 19 Howell's St. Tr. 1073; *The Attorney-General v. Le Merchant*, 2 T. R. 201; *Cooper v. Gibbons*, 3 Camp. 363. But although it be true that the refusal of a party to produce a document in his possession does not

hands of the adversary than where it is proved to have been lost or destroyed.^m Where a party, after notice, refuses to produce an agreement, it is to be presumed, as against him, that it is properly stamped.ⁿ *Where the declaration in covenant alleged that the deed was in the possession of the defendant, and on *non est factum* pleaded, it was proved that the deed was in the hands of the defendant, to whom notice had been given to produce the deed, and the plaintiff gave parol evidence of the deed, the attesting witness being in court; it was held that the parol evidence was well received.^o Where two parts of an agreement are signed by both parties, one of which is stamped, and is the possession of the de-

authorize any direct inference as to the contents of the writing; *Lawson v. Sherwood*, 1 Stark. C. 314; E. C. L. R. 2; *Cooper v. Gibbons*, 3 Camp. C. 363; and can in no case supply the defect of proof where written proof is requisite; as where the action is brought on a bond of which the defendant, the obligee, has obtained possession, there seems to be no rule of law which excludes, or which can exclude, a jury from taking this circumstance into consideration in connection with other circumstances in forming their conclusion on a matter of fact, to the proof of which written evidence is not essential. It is scarcely possible that an unfavorable presumption should not be made against a trader, who, upon the question whether particular goods had been paid for by a customer, refused to produce his books when called for to show credit given. This principle seems, in effect, to be admitted by the authorities (see note (m)), which state that slighter evidence will suffice to prove a deed where it is in the hands of the adversary, that when it is lost or destroyed; see *Roe v. Harvey*, 4 Burr. 2484; *Bate v. Kinzey*, 1 C. M. & R. 41. But now, by 15 Vict. c. 99, s. 6, the party may obtain the evidence by a summons.

^m 12 Vin. Abr. T. b. 65, pl. 22; *Eccleston v. Speke*, Carth. 79; see *Pritt v. Fairclough*, 3 Camp. 305, *supra*. In covenant by a remainderman for not repairing; plea, that lessor was only tenant for life; held, that after notice to the plaintiff to produce a specific deed, the steward might be called to prove the existence and nature of it; and although the possession of the steward might be considered as the possession of his principal, so as to protect him from producing it under a *spa. duces tecum* his knowledge of the contents was not within the principle of privileged communications, which extend not beyond counsel and attorneys; *Earl of Falmouth v. Moss*, 11 Price, 455.

ⁿ *Crisp v. Anderson*, 1 Stark. C. 35; E. C. L. R. 2; *Pooley v. Goodwin*, 4 Ad. & E. 94; E. C. L. R. 31. But if the person who gives secondary evidence of its contents shows it to be unstamped the case is different; see *Crowther v. Solomons*, *ante*, p. 541, note (n). A judge has no power to order, in the case of a document supposed to be lost, that if the party does not produce it to be stamped a copy stamped shall be read in evidence, and the other side shall be precluded from producing the original or objecting that it was not stamped; *Raven v. Hamilton*, 15 Q. B. 191; E. C. L. R. 69.

^o *Cooke v. Tanswell*, 8 Taunt. 450; E. C. L. R. 4. So in a case of a notice to quit; *Poole v. Warren*, 8 Ad. & E. 582; E. C. L. R. 35.

fendant; if he refuse to produce it upon notice, the unstamped part is receivable as secondary evidence of the contents of the other.^p So, although the unstamped counterpart were not signed by the parties.^q If a party, after notice, does not produce a document in his custody, the party giving the notice is entitled to give secondary evidence of the instrument. And it has been held, that in such case the party giving the notice, may give such secondary *571] evidence without calling the subscribing witness;^r even although he know the name of the subscribing witness.^s Where a party is proved to have destroyed a document which would have been evidence against him, slight evidence will usually be sufficient to supply it.^t The same principle applies where the party for sinister purposes withholds the instrument. Where the instrument is out of the power of the party, secondary evidence is admissible. As where a will remains in Chancery by the order of the court.^u The party obliging the adversary to give secondary proof, cannot by retracting or producing the original, compel him to give the ordinary proof;^v nor can he produce it as part of his own case.^w Nor can he put it into the hands of a witness, and examine as to the time when an interlineation was made in it.^x

^p *Waller v. Horsfall*, 1 Camp. C. 501. It seems, that where the instrument, if produced by the adversary on notice, would have been admissible in evidence without proof of execution, a copy is also admissible in evidence without proof of execution; *Doxon v. Haigh*, 1 Esp. C. 409. In an action of covenant on an indenture of apprenticeship, where the defendant did not produce it after proof of possession by him and notice, it was held that the plaintiff might give parol evidence of the contents, without calling the subscribing witness; *Cooke v. Tanswell*, 8 Taunt. 450; E. C. L. R. 4.

^q *Garnons v. Swift*, 1 Taunt. 507.

^r *Cooke v. Tanswell*, 8 Taunt. 450; E. C. L. R. 4. Where an instrument has been destroyed and the witness is known, he must be called; *Gillies v. Smithers* 2 Stark. C. 528; E. C. L. R. 3. But where the plaintiff declared upon a lost bond, and a witness stated, that there were attesting witnesses whose names he did not know, it was held, that the plaintiff was entitled to recover without calling either of them; *Keeling v. Ball*, Peake's Ev. 96.

^s *Cooke v. Tanswell*, *supra*, per Gibbs, C. J.

^t A small matter will supply it. *Per Holt, J., Anon.* Lord Raym. 731.

^u B. N. P. 254; 10 Co. 92.

^v *Jackson v. Allen*, 3 Stark. C. 74; E. C. L. R. 3; *Edmonds v. Challis and others*, 7 C. B. 413; E. C. L. R. 62.

^w *Doe dem. Thompson v. Hodgson*, 12 Ad. & E. 135; E. C. L. R. 40. Nor even use it to refresh the memory of a witness; *per Wilde, C. J., Bristol Assizes*, 1847, Roscoe on Evidence, 8th ed. 11.

^x *Doe v. Cockell*, 6 C. & P. 525; E. C. L. R. 25. See *Lewis v. Hartley*, 7 C. & P. 405; E. C. L. R. 32.

A deed or other instrument may be read without proof of execution, by virtue of a rule of court to that effect.⁷ And now by rule H. T., 4 Will. IV., a judge at chambers may, with consent, order the admission in evidence of documents upon notice given in due form. The judge's order is expressed to be with a saving of all just exceptions to the admissibility of the document; and therefore they may still be taken at the trial. The admission of a document under this order is a waiver of any objection to interlineation in it, for as it prevents the necessity of calling *the attesting witness, it should also prevent the taking of any objection which such a person could remove,⁸ but it does not waive an objection to the stamp.⁹ So a document may be read without proof, where the party or his attorney makes an admission of its execution deliberately for the purposes of the cause.¹⁰ If the admission be signed by the attorney on the record, it may be read; but if he be not the attorney on the record, further proof must be given to show that he was the authorized agent of the party.¹¹ So it may be read, if the attorney agree that the other party should act on the instrument, as if the witness had been produced;¹² or even merely agree to admit the handwriting.¹³ But notwithstanding an agreement by the attorney to admit the due execution of the specialty mentioned in the declaration, the defendant may still object on the ground of variance.¹⁴ So the deed may be

⁷ Gilb. Law of Ev. 91; Tr. per Pais, 446. For the general rule H. 4 Will. IV. r. 20, as to the admission of documents, see Vol. II. tit. ADMISSIONS.

⁸ *Freeman v. Steggal*, 19 L. J., Q. B. 18.

⁹ *Vain v. Whittington*, Car & M. 484; E. C. L. R. 41.

¹⁰ *Griffiths v. Williams*, 1 T. R. 710; where it was the attorney's agent; *Young v. Wright*, 1 Camp. 140; *Gainsford v. Grammar*, 2 Camp. 9. But mere statements made by an attorney in the course of conversation are not admissible; *Parkins v. Hawkshaw*, 5 Stark. C. 239; *Petch v. Lyon*, 9 Q. B. 147; E. C. L. R. 58; *Wilson v. Turner*, 1 Taunt. 398. Although made to the opposite attorney, not being intended as an admission in the cause; *Petch v. Lyon*, 9 Q. B. 147; E. C. L. R. 58. But an undertaking by the attorney to appear for L. and M., joint owners of the sloop A., is evidence that they were such owners; *Marshall v. Cliff*, 4 Camp. 133. And a mere agreement to produce a particular instrument does not dispense with the necessity of proof when produced; *Wetherston v. Edgington*, 2 Camp. 94. See Vol. II. tit. ADMISSIONS.

¹¹ He must have been the party's attorney when the admission was made; *Wagstaff v. Wilson*, 4 B. & Ad. 339; E. C. L. R. 24.

¹² *Laing v. Kaine*, 2 B. & P. 85.

¹³ *Milward v. Temple*, 1 Camp. C. 375. See B. N. P. 254.

¹⁴ *Goldie v. Shuttleworth*, 1 Camp. 70. But he must take care that the terms

*573] read where it is admitted *by the pleadings. In all these cases the consent of parties supersedes the necessity of the usual proof,^g since it is the office of the jury to decide upon those facts only which are in controversy. It has been already seen that a mere parol admission, or even an admission in Chancery,^h by a party of his execution of a deed, was formerly considered insufficient, but that such proof will now suffice.ⁱ

By the stat. 27 Hen. VIII., c. 16, a bargain and sale of an estate of inheritance or of freehold, must be enrolled.^k And since *574] the law requires such enrolment, it has been held in many

of the admission do not exclude him from taking the objection; *Wilkes v. Hopkins*, 1 C. B. 737; E. C. L. R. 50; and see *Pilgrim v. Southampton Railway Company*, 18 L. J., C. P. 330.

^g It may be used on a new trial; *Elton v. Larkins*, 1 M. & Rob. 196; *Langley v. Earl of Oxford*, 1 M. & W. 508; and cannot be retracted, even by a new attorney after the death of the attorney who made it; *Doe dem. Wetherill v. Bird*, 7 C. & P. 6; E. C. L. R. 32; *Wilkes v. Hopkins*. An admission signed by the obligor's attorney, acknowledging the signature of his client and of the attesting witness, is presumptive evidence of delivery; *Milward v. Temple*, 1 Camp. 375.

^h As to admissions of execution by the parties themselves, see *ante*, pp. 505, 506.

ⁱ *Supra*, 505. In one case, where the subscribing witness did not appear, an indorsement by the obligor on the deed was read, reciting a proviso within the deed, that it should be void on payment of a sum of money, and acknowledging the non-payment, and admitting the deed; this was held to be proof (B. N. P. 254); but note, that in this case the witness did not appear, and *qu.* whether his absence was not accounted for.

^k See *supra*, p. 261, note (j). Deeds were also enrolled at common law *pro salva custodiâ*; 1 Salk. 389. And at common law any deed may be enrolled upon the acknowledgment of a party to it, who cannot afterwards deny the execution; B. N. P. 256. The enrolment of a deed under this statute is a record; *R. v. Hopper*, 3 Price, 495. And therefore is not traversable in any material part, such as the date of the enrolment; 3 Price, 495. Hence an examined copy of a memorial of a deed required to be enrolled by an Act of Parliament, is evidence of the instrument. Thus it has been held, that an examined copy of the memorial of an assignment of a judgment, which was required to be enrolled, was evidence of the fact of assignment. See *Hobhouse v. Hamilton*, 1 Sch. & Lef. 207; *Fitzgerald v. Fitzgerald*, 8 C. B. 592; E. C. L. R. 65. In the case of *Baikie v. Chandless*, 3 Camp. C. 17, in an action against an attorney for negligence in the purchase of an annuity, which was void for want of a sufficient memorial, in order to prove the memorial a copy was offered in evidence, which had been examined with the instrument at the Rolls; upon the objection taken, that a copy of the original memorial which the defendant had carried in should be produced, Lord Ellenborough held, that the copy proposed was admissible. The Act required the memorial carried in to be enrolled correctly; and it was to be presumed that those concerned had done their duty under the Act. The enrolment was a sort of statutable record, and an examined copy of it admissible. In the case of *Tinkler v. Walpole*, 14

cases that enrolments is sufficient evidence of the lawful execution of the deed,¹ as against all parties.

*The practice is admitted, but the principle doubted, in Buller's Law of Nisi Prius,^m both because the authority [*575 relied upon in support of such practice is the lease of *Smartle v. Williams*, where the acknowledgment was by the bargainor, against whom the enrolment was offered in evidence, and not by the bargainee, as stated in the report of Salkeld;ⁿ and besides, that the bargain and sale in that case was of a mere term, and therefore was not within the statute. But it seems that the enrolment of any deed upon the acknowledgment of a party is evidence against himself, whether the deed does or does not need enrolment, as in the case of *Smartle v. Williams*,^o of a release, and this has been the

East, 226, the case of a ship's register was distinguished from that of an enrolment under a statute; Lord Ellenborough observed, "The case of enrolments stands on a particular statute; the statute of Anne (10 Anne, c. 18, s. 3,) provides, that copies of the instrument of indentures of bargain and sale, examined with the enrolment, signed by the proper officer, and proved on oath, shall have the same force and effect as the original indentures. But the Register Acts have not attributed to the registers the same effect as if the persons named therein were proved to be the owners."

¹ *Wymark's case*, 5 Co. 74; Stile, 462; *Eden v. Chalkill*, 1 Keb. 117; *Smartle v. Williams*, Salk. 280; B. N. P. 255, 256. A copy of an enrolment of a deed to lead the uses of a fine is *prima facie* evidence of the deed; *Taylor v. Jones*, 1 Ld. Raym. 746. An enrolment of a deed is not a record, because it is not the act of the Court, but only the private act of the party authenticated in Court; Gilb. Law of Ev. 92. But see *R. v. Hopper*, 3 Price, 495, where it was held that the enrolment of a bargain and sale, under the stat. of Hen. VIII., was a record, that the date was a material part of the record, and that proof of a different date was not admissible. All acknowledgments of deeds in K. B. are, by rule of Court, to be made on the plea side, in open court (1 Salk. 389), and the enrolment is made either upon the acknowledgment or proof of the delivery of the deed by the party; Com. Dig. Bargain and Sale, B. 6; for the bargainor might die before acknowledgment. After a deed had been enrolled, it seems that a party could not plead *non est factum*, but that he might avoid the effect of it by pleading *reins passa par le fait*; Gilb. Law of Ev. 145; 1 Leon. 184-5. And infants, feme covert, and strangers, Com. Dig. Bargain and Sale, B. 10, are not concluded by the enrolment. The indorsement of a registration in Ireland, on a deed executed there, need not be proved; *Pyne v. Dor*, 1 T. R. 55. See also *Garrick v. Williams*, 3 Taunt. 540.

^m B. N. P. 255; *Smartle v. Williams*, 3 Lev. 387.

ⁿ 1 Salk. 280.

^o 3 Lev. 387; Com. Dig. tit. Evidence, B. 1. It was observed by Bayley, J., in the case of *Tinkler v. Walpole*, 14 East, 230, that in the case of *Smartle v. Williams* the deed was thirty years old; and see B. N. P. 255, where it is said that if the deed need no enrolment, the enrolment will not be evidence; 1 Keb. 117; Salk. 280.

practice.^p The register of a conveyance in a register county, is not evidence, except as secondary evidence, where the adversary has had notice to produce the conveyance.^q When the deed is enrolled, the indorsement of the enrolment is evidence without further proof, because the officer is entrusted to authenticate *such a deed by enrolment.^r But where a copy is used as *576] secondary evidence, it must be proved to have been examined with the enrolment.^s

A deed purporting to be the deed of several, may be enrolled on the acknowledgment of one alone,^t and is sometimes enrolled upon the acknowledgment of a mere nominal party, whose name is introduced for the very purpose, the parties themselves residing abroad.^u It would, therefore, be manifestly inconsistent with the plainest principles of justice to admit such enrolments to be evidence against those who have not acknowledged them, without proof of the execution of the deeds; as, for instance, to receive a deed acknowledged by a bare trustee, without proof of execution by the owner of the inheritance.^x And although it appears that an opinion once prevailed to this effect, yet it seems to be so destitute of principle, that it is not probable that it would now be acted upon.

By the stat. 10 Anne, c. 18, s. 3,^y where in any pleading any.

^p B. N. P. 256. In *Lady Holcroft v. Smith*, 2 Freeman, 259, a distinction was made between deeds of bargain and sale, enrolled in pursuance of the statute, and other deeds enrolled; and the court held, that a copy of a deed enrolled for safe custody, would not be evidence otherwise than against the party who sealed it, and all claiming under him.

^q *Molton v. Harris*, 2 Esp. C. 549. And it is such evidence against the representatives of the party by whom the conveyance was registered; *Wollastonson v. Hakewill*, 3 M. & G. 297; E. C. L. R. 42. An examined copy is evidence; *Doe v. Kilner*, 2 C. & P. 289; E. C. L. R. 12.

^r The production of a deed with the memorial indorsed is sufficient proof of the enrolment; *Compton v. Chandless*, 4 Esp. C. 18; B. N. P. 229.

^s B. N. P. 229.

^t B. N. P. 256; *Thurle v. Madison*, Sty. 462.

^u Salk. 389.

^x B. N. P. 256.

^y This provision was made for supplying a failure in pleading or deriving title to lands, conveyed by such deeds of bargain and sale, where the original indentures are wanting, which often happens, especially where divers lands, &c., are comprised in the same indenture, and afterwards devised to different persons. See 14 East, 231, 1 Sch. & Lef. 107. Before this statute an enrolment could not have been pleaded, although a deed had been exemplified under the great seal; it was necessary to make a *profert* of the deed itself under seal; Co. Litt. 225, b.; and see *Olive v. Gwyn*, Hard. 119; see the stat. 8 Geo. II., c. 6, s. 22, concerning Deeds of Bargain and Sale of Lands in the North Riding of Yorkshire.

indenture of *bargain and sale* enrolled shall be pleaded with a *profert in curiâ*, the person so pleading may produce a copy of the enrolment of such bargain and sale: *and such copy, examined and signed by the proper officer, and proved upon oath [*577 to be a true copy, shall be of the same force as the indentures of bargain and sale would be.^y

It is sufficient for a party in ejectment on an annuity deed to prove the deed without proving the enrolment, and it lies on the party who insists on the want of enrolment to prove the negative.^z It seems that a bargain and sale and enrolment of lands conveyed to a charity, will not be presumed from long enjoyment.^a

Although it has been held that a deed to lead the uses of a fine requires no proof,^b on account of the strong presumption that the parties meant to convey the lands to some uses or other; yet in a subsequent case, the judges were of opinion that such a deed must be proved.^c So it seems that the counterpart of such a deed is not admissible in evidence without the usual proof.^d

It has been held that a recital of a deed in a subsequent deed is evidence of the former against a party to the latter. Thus, a recital of the obligor's appointment to an office, in a bond for faithful execution of its duties, is evidence against him of that appointment.^e The recital of a lease is evidence of the lease against the releasor, and those who claim under him;^f for it *operates [*578

^y As to deeds registered under 7 Anne, c. 20, see *Doe v. Clifford*, 2 C. & K. 448; E. C. L. R. 61.

^z *Doe v. Bingham*, 4 B. & Ald. 672; E. C. L. R. 6; *Doe v. Mason*, 3 Camp. 7.

^a *Doe v. Waterton*, 3 B. & Ald. 149; E. C. L. R. 5. Whether such enrolment need be proved by the party setting up the deed, see *Doe dem. Williams v. Lloyd*, 1 M. & G. 671; E. C. L. R. 39; at all events, the memorandum indorsed, purporting to be signed by the proper officer, is sufficient; *Ibid.*

^b *Glascocock v. Warren*, B. N. P. 254.

^c *Griffith v. Moore*, B. N. P. 255.

^d B. N. P. 255; Salk. 287, *contra*; see *Doe v. Pulman*, 3 Q. B. 622; E. C. L. R. 43.

^e *R. v. Welsh*, 2 C. & K. 296; E. C. L. R. 61.

^f *Ford v. Lord Grey*, 6 Mod. 44; *S. C.*, Salk. 285; *Cragg v. Norfolk*, 2 Lev. 108; *Fitzgerald v. Eustace*, Gilb. Law of Ev. 87; Hard. 123; *Plumer v. Brisco*, 11 Q. B. 46; E. C. L. R. 63; and see *ante*, p. 506, 507. See Vol. II., tit. ADMIS-SIONS—NOTICE—RECITAL. Com. Dig. Ev. B. 5. It seems that a recital is always evidence as against the party to a reciting lease, where it operates by way of estoppel, although not against another party where it cannot so operate; see *Cragg v. Norfolk*, 2 Lev. 108; 2 Vent. 170; Roll. 678, l. 4; and therefore the recital, in a grant of an office, of a former grant, on the determination of which the present grant was to commence, is no evidence in favour of the grantee of the former

by way of admission; and therefore such a recital is not evidence against a stranger to the second deed.^{§1}

grant. *Ib.* But if one relies on a patent to prove a former grant which it recites, it is also evidence to prove a surrender, which it also recites; 2 Vent. 171; Com. Dig. Ev. B. 5. An averment, in a declaration against a master for not inserting the true consideration in an apprentice deed, that *A. B.*, by a certain indenture, put himself apprentice to the defendant, is proved by the production of the part executed by the defendant, in which it is recited that *A. B.* put himself apprentice, &c.; *Burleigh v. Stibbs*, 5 T. R. 465. It was questioned in *Pearce v. Morrice*, 2 Ad. & E. 84—E. C. L. R. 29—where in the attestation of a deed the parties state that the two parts were executed by them respectively, whether they are thereby estopped from denying the execution by the others; and see *Willington v. Browne*, 8 Q. B. 169; E. C. L. R. 55.

[§] 5 T. R. 465.

¹ The rule of law is that a deed, containing a recital of another deed, is evidence of the recited deed against the grantor and all persons claiming by title derived from him subsequently; *Jackson v. Harrington*, 9 Cow. 86. But such recital is not evidence against a stranger, nor against one who claims by title derived from the grantor before the deed which contains the recital; *Penrose v. Griffith*, 4 Binney, 231; *Garwood v. Dennis*, Id. 327; *Morris' Lessee v. Vanderen*, 1 Dallas, 67; *Hites' Heirs v. Shrader*, 3 Littell's Rep. 447. Thus recitals of mesne conveyances, contained in a patent from the Commonwealth to A. are not evidence of these conveyances against B. who claims under a warrant from the Commonwealth issued prior to the date of the patent; *Bell v. Wetherill*, 2 Serg. & Rawle, 350; *Stewart v. Butler*, Ibid. 382. This rule, however, does not hold where the defendant shows *no title*; *Downing v. Gallagher*, Ibid. 455. Whether, after long possession, a recital in a patent would not be evidence in such case. *Quære*, *Penrose v. Griffith*, *ubi sup.* But where a satisfactory foundation is laid of the former existence and loss of an ancient deed, and where the subscribing witnesses have been long dead, and there has been no possession against the deed, and the recital is made by those who were likely to be acquainted with the truth of the fact; such recital is evidence of the lost deed as against strangers; *Garwood v. Dennis*, *ubi sup.* So a deed containing a recital by the person to whom the lost deed is alleged to have been made, who had been in possession a long time, and who held originally as tenant by the curtesy, may be admitted to explain the nature of his possession, and to show that he exercised acts of ownership, of a public nature, inconsistent with the courtesy-estate; *Ibid.* Though the existence of an absolute deed or lease, may be proved by a recital in another deed against the party making such recital, and all claiming under him, yet it seems that the existence of an outstanding mortgage cannot be proved by such recital; for, if produced, it might appear to have been satisfied, no release being necessary to restore the title to the mortgagor; *Jackson v. Davis*, 18 Johns. 11, 12, per Platt, J. A recital in a deed, that certain land had become the property of A. is *prima facie* evidence against the grantor, that A. had an estate in fee, subject to be rebutted by proof that he had a life estate only; *Stoever v. Lessee of Whiteman*, 6 Binney, 416. But a recital that the grantor had entered upon lands, con-

No objection, it has been said, arising intrinsically from the contents of an instrument, can preclude the reading of it, for till it has been read the court cannot judge of the objection.^h The deposition of one *Cowden* was offered in evidence, and proof was given of the death of one *Cowden* who lived at Bow; and Reynolds, C. B., allowed the deposition to be read upon this evidence, because it did not appear, otherwise than by the deposition, that *Cowden* lived elsewhere than at Bow, and therefore the objection, that the *Cowden* whose death was proved was not the *Cowden* who *made the deposition, was incomplete unless it was coupled with the [*579 deposition.ⁱ But he said he would leave it to a jury to determine whether the man whose death was proved was the man who made the deposition.^k If upon the reading it appear that some part is not properly admissible in evidence, as if it rest upon mere hearsay, or if an accomplice in his confession charge a confederate, the

^h Where an objection was taken to the reading an entry from a corporation-book, on the ground that it contained many things not relating to the corporation, Lord Hardwicke said, that as the objection was derived from the book itself, it was impossible to say that it should not be read; but that if any material objection should appear to the book on reading, he would mention it to the jury on summing up; *Moore v. Mayor of Hastings*, 17 How. St. Tr. 845. It is, however, to be observed, that the Court may look at and read a document, in order to ascertain whether it is admissible—*e. g.*, in case of a stamp objection—without having it read aloud. The rule upon this subject has been much better understood of late, and the old cases can hardly be treated as authorities.

ⁱ *Benson v. Olive*, 1 Ford's MS. 146.

^k *Ibid.* This seems to be erroneous; as it was a question for the judge.

veyed to A., for condition broken, does not estop a party who claims under A. and not under the deed containing the recital, though that deed is given in evidence by him to prove a conveyance to A.; *Ibid.* A recital in a deed by two trustees, that a third trustee had refused to intermeddle with the trust, is not evidence of the fact; *Milner v. Cummings*, 4 Yeates, 577. But recitals in a conveyance are evidence of pedigree; *Lessee of Paxton v. Price*, 1 Yeates, 500; *Morris' Lessee v. Vanderen*, *ubi sup.*

If an ancient deed—which when possession corresponds, proves itself—recite a power of attorney necessary to give it validity the due execution of the power will be presumed: *Doe v. Phelps*, 9 Johns. 169; *Doe v. Campbell*, 10 Id. 475, S. P. So if the reciting deed is proved in the usual manner; *Davidson's Lessee v. Beatty*, 3 Har. & McHen. 594. If a testator recite in his will that he has conveyed his lands to persons therein named, such recital will estop his heirs from claiming the lands; *Den v. Cornell*, 3 Johns. Cas. 174. An admission, contained in a recital of a deed of one of the lessors in ejectment, is evidence against all of them; *Brandt v. Klein*, 16 Johns. 335.

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court will, upon summing up, advise the jury to leave the objectionable part out of their consideration.¹

It is also a rule that no intrinsic matter will obviate an extrinsic objection to the reading of the document.^m

It is also a general rule, that where any document is produced and read by one party, the whole is to be read, if the adversary require it; "for unless the whole be read there can be no certainty

*580] as to the real sense and meaning *of the entire document.

The entirety, however, required by this rule, is confined to the document in the state in which it is produced; the fact that as produced it is in a mutilated state, applies not to the admissibility, but to the value of the evidence.^o Upon the same principle, where one document refers to another, the latter is, for the purpose of such reference, incorporated with the former, and may be read to explain it; as where the deposition of the captain of a ship refers to the log-book; ^p or a letter produced upon notice refers to other

¹ See Lord Hardwicke's observations, 17 How. St. Tr. 845; *Moore v. The Mayor of Hastings*; and of Wood, B., in *Bullen v. Michel*, 2 Price, 405.

^m 1 Ford's MS. 115; *Adamthwaite v. Singe*, 1 Stark. C. 113; E. C. L. R. 2.

ⁿ *Earl of Bath v. Bathersea*, 5 Mod. 9; 1 Ford's MS. 146; Andr. 258; but see *supra*, p. 444. In equity, when a passage is read from the defendant's answer, all the facts stated in that passage must be read; and if it refer to facts stated in any other passage, that must be read for the purpose of explanation; but if new facts be contained in such other passage, they are to be read for the purpose of explanation only; *Bartlett v. Gillard*, 3 Russ. 159. Where in a suit for a legacy, the executor in the answer admitted assets but insisted that under the circumstances the legacy had been paid; it was held (in equity) that the plaintiff was entitled to read the admission without reading the additional statement; *Connop v. Hayward*, 1 Y. & C. 33. So where it was necessary to prove a rule of a benefit society by a transcript of the rules in the office of the clerk of the peace, it was held requisite to produce a transcript of all the rules; *R. v. Boynes*, 1 C. & K. 65; E. C. L. R. 47. Where part of a return to the office of first fruits, stating a collation to a rectory, was material and admitted; it was held that the rest of the return was admissible as showing the value and accuracy of the document; *Irish Society v. Bishop of Derry*, 12 Cl. & F. 641.

^o Tindall, C. J., delivering the opinion of the Judges in *Lord Trimlestown v. Kemmis*, 9 Cl. & F. 775.

^p Where an agreement, under which a party contended that possession of a ship to be built for him had been given him, in order to show that the assignees of the builder of the ship (who had become bankrupt) had no title, recited a former agreement on which the assignees relied to show their title, it was held that the assignees were entitled to have the letter read; *Goss v. Quinton*, 4 Sco. N. S. 471; and *Falconer v. Hanson*, 1 Camp. 171; *Johnson v. Gilson*, 4 Esp. C. 21; *Wheeler v. Atkins*, 5 Esp. C. 246.

letters;^a or an interrogatory upon the examination of a witness to a letter.^c A written answer made by a party to a question proposed to him, cannot, it is said, be *read without showing the question to which it relates,^d not as evidence of the fact, [*581 but to explain the answer.

But letters written by a party are evidence against him without producing those to which such letters are answers;^e and a letter written by the plaintiff's agent to a witness is evidence against the plaintiff,^f and does not make the answer of the witness evidence for the plaintiff.

^a *Johnson v. Gilson*, 4 Esp. 21; *secus*, if the letter merely state that others are enclosed under its cover. Where letters are put in, bearing different dates, others sent in the interval, which form part of the same correspondence, cannot be received, unless expressly referred to in the letters put in; *Sturge v. Buchanan*, 2 M. & Rob. 90. Where the plaintiff proposed to give in evidence a letter of the defendant's attorney, which appeared to be an answer to one from the plaintiff's attorney, Pollock, C. B., thought he ought not to do so without putting in the letter; *Watson v. Moore*, 1 C. & K. 626; E. C. L. R. 47. But see *contra*, *Lord Barrymore v. Taylor*, 1 Esp. 326.

^c *Wheeler v. Atkins*, 5 Esp. C. 246, and note; if the interrogating party refuse to produce the letter, he must abandon the whole of the interrogatories. Where, however, a book of accounts, or shop-book, is produced in evidence at the request of one of the parties, the reading an entry from it does not entitle the other party to read all the other entries in the book, but only such as relate to the same particular subject-matter. *Per Abbott, C. J., Catt v. Howard*, 3 Stark. C. 3; E. C. L. R. 3; and see *ante*, p. 235; but see *Wharam v. Routledge*, 5 Esp. C. 235.

^d *Rex v. Picton*, Howell's St. Tr. vol. xxx. p. 466; and see *Watson v. Moore*, *supra*. But an answer in chancery is evidence as an admission under the defendant's hand, where the bill is proved to have been lost; *Hart v. Harrison*, Mich. 3 Geo. II.; 1 Ford's MS. 145. On an examination before the commissioners of bankruptcy, a machine-copy of a letter was produced by the witness, of which the solicitor to the commission took a copy, held, that in an action by the assignees, the latter copy was inadmissible against the party producing the machine-copy, without reading his examination, although notice had been given to produce the machine-copy; *Holland v. Reeves*, 7 C. & P. 36; E. C. L. R. 32.

^e *Lord Barrymore v. Taylor*, 1 Esp. C. 326. The admission by a witness in court is evidence against him, although he was prevented from entering into any explanation; *Collett v. Lord Keith*, 4 Esp. C. 212. So the examination of a party by commissioners of bankruptcy, signed by him, is evidence, although part only was taken down; *Milward v. Forbes*, 4 Esp. C. 172.

^f Where the plaintiff's agent wrote a letter to a witness (living abroad and examined by commission,) the draft of which was shown to and approved by his attorney; held, that the draft was admissible without producing the original, as evidence of an act done, but that the answer of the witness to the agent was not admissible: *Rawlins v. Desborough*, 8 C. & P. 321; E. C. L. R. 34; 2 M. & Rob. 70.

It is also a general rule, that whenever a party makes a statement or admission, whether it be oral or written, which is afterwards used against him as evidence of the stated or admitted fact, the whole of the contemporaneous statement or declaration must be received; the part which operates for him, as well as that which makes against him, is admissible evidence to prove the existence of the fact. Thus, where the defendant stated an account, in which he admitted the plaintiff's claim to a certain extent, but stated also *582] a counterclaim for a sum specified, it was *admitted that the plaintiff on this evidence was entitled to recover no more than the balance.*

The principle does not apply where another entry happens to be made upon the same paper or parchment, wholly distinct from that which the party reads in evidence.⁷

And the rule is subject to the qualification that the additional statement must be so connected with that which has been given in evidence as tending to show its true nature and bearing.⁸

^x *Randle v. Blackburn*, 5 Taunt. 245; E. C. L. R. 1; *Harrison v. Turner*, 10 Q. B. 482; E. C. L. R. 59. So where, in order to prove a sufficient memorandum of an order for goods, within the 17th section of the Statute of Frauds, a letter of the alleged purchaser was read in evidence which admitted the order, but which also asserted that the goods had not been delivered in time; it was held that parol testimony was inadmissible to prove that no time was mentioned; *Cooper v. Smith*, 15 East, 103. So, if the drawer of a bill say that he does not mean to insist on notice of dishonour, but that he is only bound to pay £70, the whole statement must be taken together, and the holder can recover no more than £70; *Fletcher v. Froggatt*, 2 C. & P. 569; E. C. L. R. 12. A person, on his examination before commissioners of bankruptcy, does not bring his books with him, but while under examination consents that the accountant shall make extracts from them, such extracts were not allowed to be used in evidence without reading the examination; *Yates v. Carnsew*, 3 C. & P. 99; E. C. L. R. 14. But where the plaintiffs sue upon an account rendered by the defendant, they may impeach by other evidence an item in that account, although the account rendered was the only evidence in the action; *Rose v. Savory*, 2 Bing. N. C. 145; E. C. L. R. 29.

^y *Sturge v. Buchanan*, 10 Ad. & E. 598; E. C. L. R. 37; and see *Adey v. Bridges*, 2 Stark. C. 189; E. C. L. R. 3; where, in an action against a sheriff for a false return, it was held by Holroyd, J., that the plaintiff having given in evidence a copy of the writ, the defendant was not entitled to have his return read, which formed no part of the document which the plaintiff gave in evidence.

^z *Supra*, pp. 234, 235; *Prince v. Samo*, 7 Ad. & E. 627; E. C. L. R. 34. So, in an action for an assault, a letter had been written by the plaintiff's attorney, containing an apology; it was held, that parts of it extolling his client's character for respectability could not be read, nor was the letter admissible at all, if expressed to be written "without prejudice;" *Healey v. Thatcher*, 8 C. & P. 388; E. C. L. R. 34.

Where a party is under the necessity of producing and [*583
 *proving a writing in order to connect a defendant with the
 act of an agent, the recital of the authority under which the agent
 assumes to act will not relieve the latter from the necessity of
 proving that authority in his own justification by the proper
 evidence.^a

It is a rule equally general with the former, that in a court of
 law, it is for the jury to consider what credit is to be attached to
 the whole or any part of any particular statement, whether oral or
 written,^b although a rule less flexible seems to have been adopted
 in equity.^c It has also been seen that this rule does not make that
 evidence which has an insufficient legal foundation; as, for instance,
 where that which is stated in the document professes to be the mere
 belief or opinion of the party, or nothing more than hearsay.

^a *Gray v. Smith*, 1 Camp. 387. Vol. II. tit. TRESPASS—AGENCY; *Stanley v. Fielden*, 5 B. & Ald. 425; E. C. L. R. 7. So a plaintiff in a tithe suit in the Exchequer, who read part of the defendant's answer to show what the issues were, was not concluded by the depositions contained in such answer; *Kempson v. Forke*, 8 Price, 13.

^b *Randle v. Blackburn*, 5 Taunt. 245; E. C. L. R. 1; *Beckham v. Osborne*, 6 M. & G. 771; E. C. L. R. 46. In the case of *Bermon v. Woodbridge*, Doug. 788, the whole of the plaintiff's case rested on the testimony of one witness. Lord Mansfield said that the jury might credit what the witness said for the plaintiff, although they disbelieved what he stated for the defendant; but that if they did not believe his testimony for the plaintiff, the rest of his testimony was clearly immaterial, for he was not to be believed at all, and so there was no case proved by the plaintiff; and see *Partington v. Butcher*, 6 Esp. C. 66; Vol. II., tit. LIMITATIONS.

^c *Supra*, p. 445.

PART III.

OF PROOFS.

HAVING thus treated of the general principles which regulate the admissibility of evidence, and also of the nature and qualities of the different instruments of evidence, a more interesting branch of the subject, the application of these principles and instruments to the proof of issues generally and particularly, is now to be considered.

It is to be recollected that every verdict is compounded of law and fact: of the facts, as ascertained by the finding of the jury; of the law, as expounded by the judge, with relation to the evidence, and applied by the jury to the facts. The trial is the process by which the facts are thus ascertained and the law applied.

In this proceeding it is the business of the parties to supply the necessary evidence; it is the province of the court to pronounce on the legal effect of the evidence; and it is the duty of the jury to decide upon the facts, and to apply the law.^a Hence naturally result three distinct subjects for consideration: and first, as to the evidence to be supplied by the parties.

CHAPTER I.

EVIDENCE TO BE SUPPLIED BY THE PARTIES.

THIS branch of the division suggests two principal questions for inquiry: first, upon whom the proof of an issue *or fact is
*585] incumbent; secondly, as to the nature, quality, and quantity of the evidence to be adduced, in general and particular,

^a Or by a special verdict *to find the facts, so as to enable the court afterwards to apply the law.

1st. Upon whom the proof is incumbent.^b

The general rule is in conformity with the suggestions of natural reason and a principle of obvious convenience; that the party who alleges the affirmative of any proposition shall prove it;^c for a negative does not admit of the *simple and direct proof of which [586 an affirmative is capable.^d And this is conformable with the maxim of the civil law, "*Ei incumbit probatio qui dicit, non qui negat.*"¹

^b This question frequently involves that of the right to begin, which is treated of *post*, p. 595, *et seq.*

^c B. N. P. 298; Vin. Abr. Ev. (S. a.); Litt. R. 36; Gilb. Law. of Ev. 148. *Probatio incumbit ei qui allegat; negantis autem per rerum naturam nulla est probatio*; Dig. lib. 22, tit. Probat. See *Catherwood v. Chabaud*, 1 B. & C. 150; E. C. L. R. 8; where it was held, that a defendant, who pleaded an agreement between the plaintiffs and the defendant, conditional on its being assented to by all the creditors of the defendant, was bound to prove the assent of all the creditors. On an agreement by the defendant to pay £100 if the plaintiff would not send herrings for one twelvemonth to the London market, and in particular to the house of J. and A. M., the plaintiff proved he had sent no herrings during the twelvemonth to the house of J and A. M.: held sufficient to entitle him to recover; no proof being given that he had sent herrings within that time to the London market; *Calder v. Rutherford*, 3 B. & B. 302; E. C. L. R. 7. The question upon whom lies the onus of proof is often, though not always, identical with the question who ought to begin. This latter question will be discussed presently, and the cases upon it will throw considerable light upon the former question. In many cases it may be resolved by the inquiry, who would be entitled to the verdict if no evidence were given? In the case of *Amos v. Hughes*, 1 M. & Rob. 464, Alderson, B., observed, that "Questions of this kind are not to be decided by simply ascertaining on which side the affirmative in point of form lies; the proper test is, which party would be successful if no evidence at all were given? In that case the declaration alleged a breach of contract in not embossing calico in a workmanlike manner; the plea, on which issue was joined, alleged that the defendant did emboss the calico in a workmanlike manner. And it was held that the plaintiff ought to begin, for if no evidence were to be given on either side, the defendant would be entitled to the verdict, as it was not to be presumed that the work was badly executed. In replevin, or in other cases where the issue lies on the plaintiff, he is compelled to begin; *Curtis v. Wheeler*, 1 M. & M. 493; E. C. L. R. 22. Where the plaintiff in his plea to cognizances stated facts amounting to *non tenuit*, yet the affirmative being on him, it was held that he was entitled to begin; *Williams v. Thomas*, 4 C. & P. 234; E. C. L. R. 19.

^d Thus, upon an issue in which the plaintiffs alleged that certain goods were not their property, and the defendant alleged they were their goods, the onus of the proof was held by Lord Abinger to be on the defendant; *Hudson v. Brown*, 8 C. & P. 774; E. C. L. R. 34.

¹ The burden of proof is always with the party who takes the affirmative in pleading; *Phelps v. Hartwell*, 1 Mass. 71; *Phillips v. Ford*, 9 Pick. 39; *Loring*

The proof is of course to be governed by the issue; that is, some matter of fact alleged by one party and denied by the other, on the existence or non-existence of which the claim or defence is rested.

The party who alleges the affirmative of such a fact is bound to prove it, otherwise it remains unproved and the party fails in his claim or defence. So, if no evidence be given on either side. And as the party alleging and bound to prove the affirmative would fail, if no evidence were given; so, conversely, if it appeared that in case no evidence were given either party would fail, the conclusion would show that he was the party on whom the onus of proof lay. This, however, is but the same position in a different shape; the question, Who would fail if no evidence were given? must be decided by the answer to the further question, Who alleges, and is bound to prove the affirmative?

It may then be regarded as a general rule, that a party who alleges an affirmative must prove it according to the rule of the civil law; but doubt sometimes arises on the question, who does, in legal consideration, allege the affirmative. It is to be remarked that a law operates by annexing some defined consequence to some defined state of things. That to put the law in motion it is, of course, essential that the suitor should establish such a state of things as warrants such legal interference; the law, till that be done, remains quiescent, neither presuming the existence of a right until it be shown to exist by competent means, nor the existence *587] of any fact essential to the right. So, although the law is quiescent until liability be proved, yet when legal liability has once been established the law does not discharge a party from a legal liability proved to exist, unless such discharge be also established by like means. Hence, again, as the law will not presume such a discharge, neither will it presume any fact or state of things essential to such discharge, and not established by sufficient proof. When therefore issue is joined between the parties, the question as regards the onus of proof is, Which of them has alleged the existence of a state of things essential to this claim or defence? if he does not establish it by competent means it remains unproved, and *ex hypothesi* that party must fail.¹

v. *Steineman*, 1 Metcalf, 204; *Costigan v. Railroad Co.*, 2 Denio, 609; *Givens v. Tidmore*, 8 Alabama, 746; *Neal v. Fesperman*, 1 Jones (N. C.) Rep. 446; *McClure v. Purrell*, 6 Indiana, 330.

¹ If the defendant would show matter in avoidance, after a *prima facie* case has been made out by the plaintiff, the burden of proof shifts upon him; *Gray v.*

Thus the proof of an allegation of deficiency lies on the party who alleges it, although it imply a negative, for this is not to prove a mere negative, but to prove an actual relation in point of magnitude or value. Hence upon an issue, whether land assigned for payment of a legacy was deficient in value, it was held that the party who alleged that it was deficient was forced to prove it.*

It is to be observed, concerning these positions, that the rule that the party who alleges the affirmative is bound to prove it is not correct in principle, unless by alleging the affirmative is to be understood the allegation of any new matter or relation, the truth of which is essential to the allegant's case. If affirmative merely meant affirmative in form, the effect would frequently be directly at variance with the clear principles just adverted to. The rule of the civil law indeed by its latter branch, *negantis autem proprié nulla est probatio*, seems as if it had been intended to show the principle on which the *onus probandi* is thrown on the affirmant, as though the rule were founded in necessity. This is not true; the proof of a negative, although attended with inconvenience and difficulty, is yet practicable, and although convenience may be properly used as an *argument for relieving from the burden of a negative proof in particular defined instances, it supplies no certain [*588 ground for a general rule.

* *Berty v. Dormer*, 12 Mod. 526.

Gardner, 17 Mass. 188; *Attleborough v. Middleborough*, 10 Pick. 378; *Davis v. Jenney*, 1 Met. 221; *Powers v. Russell*, 13 Pick. 69; *McGregory v. Prescott*, 5 Cushing, 67; *Zerbe v. Miller*, 4 Harris, 488; *Yarnell v. Anderson*, 14 Missouri, 619; *Burrell v. Snell*, 5 Foster, 474; *Brown v. Woodbury*, 5 Indiana, 254; *Seavey v. Dearborn*, 19 N. Hamp. 351.

A party setting up the statute of limitations as a bar to a claim of property, has the burden of showing an adverse possession in himself during the period required by the statute; *Stewart v. Cheatham*, 3 Yerger, 60; see *Taylor v. Spears*, 1 English, 381; *Duggan v. Cole*, 2 Texas, 381. Where, to avoid the operation of the statute of limitations, the complainant relies upon the fraudulent concealment of the cause of action, the burden is upon him to prove such fraudulent concealment; *Reeves v. Dougherty*, 7 Yerger, 222. Where an article is sold, with a warranty or a representation amounting to a warranty as to its quality, and in an action by the seller to recover the price, the buyer relies upon a breach of the warranty or the falsity of the representation, to reduce the amount of his liability, the burden of proof is on him to show that the quality of the article does not correspond with the warranty or representation; *Dorr v. Fisher*, 1 Cushing, 271. If a party would avoid the effect of a promise made by him, by insisting that it was made in ignorance of material facts, the burden rests upon him of proving that he was thus ignorant; *Burton v. Blin*, 23 Vermont, 151.

It is to be carefully remarked, that although as a general rule the law neither presumes liability or discharge from liability, nor any fact or state of things essential to such liability or discharge, not established by competent means, the law does not, in the absence of proof of a negative where it is material to a right,^f assume the affirmative to be true; it is, on the contrary, frequently essential to the establishment of right to prove the negative of facts.^g Thus, if *A.* claim as heir at law of *B.* his elder brother, it is essential to prove, not only the death of *B.*, but that he died without leaving issue; till this be proved his title as heir is not shown, and the negative is not to be presumed, as the law will not, from the mere absence of evidence, infer or assume that the elder brother died without lawful issue, as that would be to presume a state of things to exist in support of the claimant's title; that is, in truth, to presume title.

The operation of this general principle may be carried further. It seems that the law will not infer the existence of a state of things involving a negative from the mere absence of evidence to prove the affirmative, even in a case where such state of things is the same with that already admitted to exist, and where consequently some presumption in its favour might be made as to its continuance. This conclusion seems to be warranted by the general principle *of law just adverted to, but it is also supported, if support be necessary, by the rule that every fact is to be proved by the best evidence that the case reasonably admits of, and the consideration that actual evidence of the state of things, at any point of time, must usually be more satisfactory than a mere negative inference that no change has occurred, because none is proved to have occurred.

Although the general principles may require proof of a negative in the sense explained, they relieve from proof of the negative of any matter, where the existence of the affirmative is essential to

^f Or a discharge; thus, in an action on a policy of insurance, the defence to which is the non-communication of a material fact, it is not sufficient for the defendant to prove the existence and knowledge of the plaintiff of that fact, but he must give some evidence that it was not communicated to him; *Elkin v. Janson*, 13 M. & W. 655.

^g Thus, in ejectment on a forfeiture alleged to have been incurred by breach of a covenant to insure in some office in or near London, some proof of the omission to insure must be given by the plaintiff, and a refusal to produce the receipt for the premium is not sufficient; *Doe dem. Bridger v. Whitehead*, 8 Ad. & E. 571; E. C. L. R. 35.

exempt or discharge the adversary from some duty or liability proved upon him; for the law, as has been seen, will not presume discharge from liability, nor any fact essential to such discharge, and in thus regarding the charge or duty as continuing regards the negative is true.¹

This rule, thus strictly and directly deduced from the general principle, is aided by considerations of convenience. Proof is expected from the party more likely than his adversary to be cognizant of the fact and to be possessed of the means of proof; and it is usually far more easy for that party to prove the affirmative than for the other to establish the negative. The declaration showing how a debt became due avers that it has not been paid. It is sufficient as regards the evidence, if the plaintiff prove the facts which show the defendant's liability to pay the debt; that liability being proved, the law requires the defendant to discharge himself by competent proof, and in default regards the negative as established.^h

In an action of debt for sporting without a qualification, it was sufficient for the plaintiff to prove the fact of sporting, for every

^h So upon a plea of set-off, on a bond conditioned for the payment by the plaintiff of an annuity to a third person, alleging such non-payment, the *onus probandi* is on the plaintiff; *Penny v. Foy*, 8 B. & C. 11; E. C. L. R. 15.

¹ Where a public conveyance is overturned or breaks down without any apparent cause, the law will imply negligence, and the burden of proof will be on the owners to rebut that legal presumption; *Ware v. Gay*, 11 Pick. 106. Proof of injury to a passenger on a railroad is *prima facie* evidence of negligence which the company must rebut; *Zemp v. Railroad Co.*, 9 Richardson's Law Rep. 84; *Terry v. Railroad Co.*, 22 Barbour, 574.

Where the plaintiff alleges damage, in consequence of the defendant's negligence in driving on the highway, the burden of proof is on the plaintiff to show ordinary care and diligence on his own part and negligence on the part of the defendant; *Lane v. Crombie*, 12 Pick. 177; *Tourtillot v. Rosebrook*, 11 Metcalf, 460; *Hyde v. Jamaica*, 1 Williams, 443; *Moore v. Central Railroad Co.*, 4 Zabriskie, 268; *Holbrook v. Railroad Co.*, 2 Kernan, 236; *Dyer v. Tallcott*, 16 Illinois, 300; *Railroad Co. v. Fay*, Ibid. 558; *Griffin v. New York*, 5 Selden, 456; *Dickey v. Telegraph Co.*, 43 Maine, 492.

In an action against a city corporation for injuries sustained by the plaintiff in consequence of a grating over a vault in a sidewalk giving way beneath him, it was held, that the plaintiff was bound to show affirmatively that there had been a neglect of duty by the corporation; *McGinity v. New York*, 5 Duer, 674; *Owings v. Jones*, 9 Maryland, 108. In case against a surgeon for an injury sustained by reason of alleged unskillful and careless treatment, the burden of proof is on the plaintiff to show a want of proper knowledge and skill; but it is not requisite to prove it by evidence independent of and unconnected with the evidence of the treatment of the case in question; *Leighton v. Sargent*, 11 Foster, 119.

person was declared to be liable to the claim, unless he had a *590] qualification, and to presume one would be contrary* to the general principle.¹ Where the declaration states an unlawful seizure of his goods by the defendant, it is sufficient if the plaintiff show affirmatively the fact of seizing his goods, for the facts show that the defendant was amenable, unless he had lawful cause for seizure, and if he show none, none can be presumed for him^k who alleges and is bound to prove the affirmative.¹

Hence it is a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact, of which he is supposed to be cognizant.¹ A defendant cannot set-off cash-notes of the bankrupt in an action by the assignees, without proof

¹ *R. v. Stone*, 1 East, 639; *Spiers v. Parker*, 1 T. R. 144; *R. v. Jarvis*, 1 Burr. 148; *R. v. Turner*, 5 M. & S. 206; see *Frontine v. Frost*, 3 B. & P. 305; 8 Ad. & E. 575, 576; E. C. L. R. 35; *supra*, n. (c). Where a party before a justice admits the trading as a hawker or pedlar, it is incumbent on him to prove that he had a licence; *R. v. Smith*, 3 Burr. 1475. So on a charge of selling ale without a licence; *R. v. Hanson*, Paley on Conv. 176, 3rd edit. In such a case the defendant suffers not the slightest inconvenience from the general rule, for he can immediately produce his licence; whereas, on the other hand, the prosecutor would be put to great inconvenience; *per Abbott, C. J., ibid.*; and see *Apothecaries Company v. Bentley*, Ry. & M. 159; E. C. L. R. 21; where Abbott, C. J., held that the defendant in an action for penalties for practising as an apothecary must prove his qualification.

^k *Aitcheson v. Madock*, Peak. C. 218; and see *Evans v. Birch*, 3 Camp. 10.

¹ *Per Ashhurst, J.*, 6 T. R. 57, *post*; *R. v. Turner*, 5 M. & S. 211; *per Holroyd, J.*, in *R. v. Burdett*, 4 B. & Ald. 140; E. C. L. R. 6; *Catherwood, v. Chabaud*, 1 B. & C. 150; E. C. L. R. 8, see *Booth v. Millns*, 15 M. & W. 669. On a question whether a lease granted by a tenant for life, under a power to grant leases, contained a reservation equal to or greater than that in a pattern lease produced, in an action of ejectment by the remainderman, it is incumbent on the party who claims under the lease to prove the fact; *Doe v. Grazebrooke*, 4 Q. B. 406; E. C. L. R. 45.

¹ In an indictment for keeping a ferry without license, the burden is upon the defendant to show that he has a licence, without the State's offering any evidence to show the contrary; *Wheat v. The State*, 6 Missouri, 455. In a *qui tam* action against a clerk, for issuing a licence to marry a female under age, without the consent of the parent or guardian, the plaintiff is not bound to prove the negative averments, that such consent was not given. The record of the fact would be *prima facie* evidence of it, and being in the possession of the clerk, it is his duty to produce it, without any evidence by the plaintiff to support his defence; *Blann v. Beal*, 5 Alabama, 357. So, in a similar action to recover a statute penalty for marrying minors without the consent of their parents or guardians, the burden is on the defendant to show such consent; *Medlack v. Brown*, 4 Missouri, 379.

that they came into his possession before the bankruptcy.^m A party who pleads infancyⁿ or coverture must prove it.^o

*To a plea of infancy the plaintiff replied a promise after the defendant had attained his age; and it was held to [*591 be sufficient for the plaintiff to prove a promise, and that it lay on the defendant to prove that he was not of age.^p

In an action on a policy of insurance on goods, the plaintiff having proved a barratrous act on the part of the master, it was objected that it was incumbent on him also to prove that the master was not the owner or freighter; but it was held that proof of the affirmative, if it were true, lay on the defendant.^q

There are, however, certain presumptions which the law makes relatively to particular things and circumstances which throw the onus of proof very frequently upon the party who, but for the presumption, would not be required to sustain it. This is the result of that maxim of our law, *Stabitur præsumptioni donec probetur in contrarium*, and hence in general, whenever the law presumes the affirmative, it lies on the party who denies the fact to prove the negative;^r and it is sufficient to prove a fact from which the rest of the affirmative allegation, in the absence of any other evidence, is a presumable consequence: thus, for example, if the defendant by his plea allege that there was no *consideration for a [*592 bill of exchange or promissory note on which an action is brought, the *onus probandi* lies on him, for the law presumes *prima facie* that there was a good consideration.^s If however the defend-

^m *Dickson v. Evans*, 6 T. R. 57.

ⁿ *Berty v. Dormer*, 12 Mod. 526; *R. v. Turner*, 5 M. & S. 206.

^o *Cannam v. Farmer*, 2 Car. & K. 746; E. C. L. R. 61; 3 Ex. 698.

^p *Borthwick v. Carruthers*, 1 T. R. 648; and so ruled by Holroyd, J., in *Bates v. Wells*, Lanc. Sp. Ass. 1822; *Hartley v. Wharton*, 11 A. & E. 934; E. C. L. R. 39. Where the party charged with bigamy was an infant at the time of the first marriage, which was by licence, and the register did not state any consent by parents and guardians, it was held that some evidence of consent should be given on the part of the prosecution; *Butler's case*, Russ. & Ry. Cr. C. 61.

^q *Ross v. Hunter*, 4 T. R. 33.

^r Gilb. Law of Ev. 148, cited by Lord Ellenborough, 1 East, 200. In an action by A. against B. for injury to a reversion of a copyhold estate, A.'s reversion being put in issue by the pleadings, evidence was given of receipt of rent by him from the tenant in possession, and B. proved a surrender of the estate in question, twenty-one years before the receipt of such rent by A., to a stranger. This evidence did not throw the burden upon A. of proving a reconveyance afterwards of such estate to him *Daintree v. Brocklehurst*, 3 Ex. 207.

^s *Lacey v. Forrester*, 2 C. M. & R. 59; and see *Percival v. Frampton*, 2 C.

ant, in an action on a bill or note, proves^t it to have been fraudulent or *illegal in its inception, the law then presumes that *593] it will be transferred without consideration; thus the burthen of proof is transferred to the indorsee." So where the law

M. & R. 180; *Mills v. Oddy*, 6 C. & P. 728; E. C. L. R. 25; *Easton v. Pratchett*, 1 C. M. & R. 798; *Mills v. Barber*, 1 M. & W. 427; *Smith v. Martin*, 9 M. & W. 304.

Assumpsit by the indorsee against the acceptor of a bill; plea, that it was accepted for the accommodation of the drawer, and that he indorsed it to another party without consideration, who indorsed to the plaintiff without consideration; replication, *de injuria*; it lies on the defendant to show that no consideration was given by the plaintiff; *Brown v. Philpot*, 2 M. & Rob. 255.

^t It has been said that this presumption must be founded on proof, and does not arise by inference from facts alleged and not denied by the pleadings: thus, in the case of *Edmonds v. Groves*, 2 M. & W. 642, which was an action by the indorsee against the maker of a promissory note, the defendant pleaded that the consideration for the note was money lost at gaming, that it was indorsed to the plaintiff with notice, and without consideration for the indorsement. The plaintiff replied that the note was indorsed to him without notice, and for a valuable consideration. At the trial, each party declining to give any evidence, Lord Abinger directed a verdict for the plaintiff, giving the defendant liberty to move to enter a non-suit. A motion was made on the ground that the replication admitted the original defect of consideration, and that therefore the *onus* was thrown on the plaintiff. Lord Abinger held, that as the fact of notice of the gaming transaction was involved in the issue, it was at all events incumbent on the defendant to prove that fact, in order to call on the plaintiff for proof of a new consideration. He declined to give any opinion upon the effect of an admission on the record upon the *onus probandi* of an issue already joined. Alderson, B., said that "an admission on the record is merely a waiver of requiring proof of those facts which are not denied, the party being content to rest his claim on other facts in dispute; but if any inferences are to be drawn by the jury, they must have the facts proved like any others." In the above case, if the plaintiff took the note with notice of the original vice, as the defendant alleged, and seems clearly to have been bound to prove, no title could be gained, and consequently there could be no question as to any new consideration; and see *Bennion v. Davison*, 3 M. & W. 179; *per cur.* 9 M. & W. 304. But in *Bingham v. Stanley*, 2 Q. B. 117; E. C. L. R. 42, the court held that the implied admission upon the record of fraud, or illegality in the inception of the bill or note, was sufficient to require the indorsee to prove consideration; and see *per Alderson, B.*, 13 M. & W. 144; also *post*, tit. PRESUMPTIONS.

^u *Bailey v. Bidwell*, 13 M. & W. 73. But there is no such presumption either that it was taken with notice, or after maturity; thus, in an action by a third indorsee against the maker of a note, the plea alleged an action by the second indorsee, a reference under an order of Nisi Prius, and a fraudulent transfer to the plaintiff pending the reference, the plaintiff having knowledge of the fraud; issue being taken on the fact of such knowledge, the defendant was directed to begin and prove such knowledge; *Smith v. Martin*, 1 Dowl. N. S. 418; 9 M. & W. 304; *May v. Chapman*, 16 M. & W. 355.

raises a presumption as to the continuance of life;^x the legitimacy of children born in wedlock;^y the satisfaction of a debt,^z the onus is created of rebutting it in the first instance.¹

Where the negative involves a criminal omission by the party, and consequently where the law, by virtue of the general principle, presumes his innocence, the affirmative of the fact is also presumed.²

And therefore upon an information against Lord Halifax for refusing to deliver up the rolls of the Auditor of the Exchequer, the Court of Exchequer put the plaintiff upon proof of the negative.^a In an action for putting combustible matter on board the plaintiff's ship, without giving notice of its contents, whereby the ship was destroyed, it was held that the plaintiff was bound to prove a negative which was essential to his case. *viz.*, the want of notice.^b Thus, also, in a suit for tithes in the Spiritual Court, where the defendant had pleaded that the plaintiff had not read the Thirty-nine Articles, the court required the defendant *to prove the negative.^c So in the *The King v. Hawkins*, where [594 the objection, upon an information in the nature of a *quo warranto*, was, that the defendant had not taken the sacrament within a year, the court held that the presumption was that he had conformed to the law.^d Where a woman, twelve months after her husband had

^x *Doe v. Nepean*, 5 B. & Ad. 86; E. C. L. R. 27; tit. DEATH—PEDIGREE.

^y Vol. II. tit. BASTARDY.

^z Vol. II. tit. PAYMENT.

^a B. N. P. 298.

^b *Williams v. The East India Company*, 3 East, 192.

^c *Monke v. Butler*, 1 Roll. R. 83; see also *R. v. Rogers*, 2 Camp. 654; *Powel v. Milbank*, 2 W. Bl. R. 851; *Lord Halifax's case*, B. N. P. 298; *R. v. Coombs*, Comb. 57.

^d 10 East, 211, and *per* Bayley, J., *R. v. Twynning*, 2 B. & Ald. 388. Upon an indictment under 42 Geo. III. c. 107, s. 1, (now repealed by 7 & 8 Geo. IV. c. 27, see c. 29,) which makes it felony to course deer in any inclosed ground, without the consent of the owner, it was held that it was necessary to prove the negative of such consent; *R. v. Rogers*, 2 Camp. C. 654; and see *R. v. Hazy*, 2 Car. & P.

¹ Where a marriage *de facto* is proved, the presumption is that the marriage was conducted according to law and the burden of proof is on the party denying it; *Raynham v. Canton*, 3 Pick. 393.

² Where the plaintiff in ejectment claims the right to enter upon lands for the breach of a condition subsequent, the burden is upon him to prove the breach, though a negative; but in such case slight proof would be sufficient *prima facie*; *O'Brien v. Doe*, 6 Alabama, 787. The averment of neglect of official duty must be supported by some proof by the party making it, though very little evidence will suffice to shift the burden of proof; *Dobbs v. Justices*, 17 Georgia, 624.

last been heard of, married again, and the husband had never afterwards been heard of, upon the question as to the settlement of the children of the second marriage, the court held that the justices had done right in presuming the legitimacy of the children, in the absence of any proof, except the usual presumption, that the first husband was living at the time of the second marriage.^e

So where the question arises, in a criminal case, whether the prisoner's examination was taken down in writing before the magistrate under the statute, it is incumbent on the prosecutor to give negative evidence to show that it was not taken down, for otherwise it will be presumed that the magistrate did his duty in taking the examination in writing, as the statute directs.^f

*Wherever also it has been shown that the case falls
*595] within the scope of any general principle or rule of law, or the provision of any statute, whether remedial or even penal,^g it then lies on the opposite party to show by evidence that the case falls within an exception or proviso.^h So it is incumbent on a person who alleges a particular status of an individual to prove it; thus it lies on a defendant who seeks to bring a plaintiff within an Act, which, if the defendant resided within a particular district, subjects the plaintiff to a nonsuit, to prove his residence at the time of the action brought, by particular evidence of the fact; general evidence of recent residence there is not sufficient.ⁱ

Upon an appeal against an order of removal it is incumbent on

458; E. C. L. R. 12. There the negative was part of the description of the offence. In the report of the above case, it seems erroneously (see *R. v. Allen*, 1 Mood. C. C. 154,) to have been held necessary to negative the consent by the testimony of the owner himself. In order to obviate the necessity for any such proof, various statutes have provided that the burthen of proving consent or lawful excuse, or other like matter, shall be incumbent on the defendant. These are too numerous to specify.

^e *R. v. Twynning*, 2 B. & Ald. 386; and see *Butler's case*, Russ. & Ry. Cr. C. 61, p. 591. But see *R. v. Harborne*, 2 Ad. & E. 540; E. C. L. R. 29; and see SETTLEMENT.

^f See Vol. II. tit. ADMISSION.

^g See *supra*, p. 590, note (i).

^h *Doe v. Bingham*, 4 B. & Ald. 672; E. C. L. R. 6; *Doe v. Hawthorn*, 2 B. & Ald. 101. Where a plaintiff, for the purpose of avoiding a conveyance of land, has shown it to be for a charitable use, it lies on the defendant to bring himself within the exception; 2 B. & Ald. 101. In this respect the rule of evidence corresponds with the rule of pleading; 12 M. & W. 88; 16 M. & W. 615.

ⁱ *Jones v. Kenrick*, 8 B. & C. 337; E. C. L. R. 15; and see *Tyrrell v. Holt*, 1 Barnard, 3 Geo. I.; Vin. Ab. Ev. Sa. 7; *Rawlins v. Desborough*, 2 M. & Rob. 70, *post*.

the respondents to prove their case, by establishing a settlement in the appellant's parish. Upon an appeal against a poor's-rate, on the ground that the appellant has no rateable property within the parish, the *onus* is on the respondents to prove that he has such property^k there; but if the appellant object merely to the quantum of the rate, he is to prove the inequality of such rate.¹ Upon an appeal against an order of bastardy, the respondents must begin.^m

The discussion of the question of the *onus* of proof naturally leads us to the consideration of a question which seems formerly to have been regarded as identical with it: *viz.*, the right to begin.ⁿ The decisions upon this *subject have been numerous and conflicting, and it is certainly difficult to lay down rules for [*596 guidance in all cases. The older decisions, however, though no longer recognized as authorities upon the practice in this respect, are not unworthy of note, as affording the means of determining the duties of the parties with reference to proof. Formerly, it seems to have been considered that the defendant was in all cases entitled to begin, where the *onus probandi* lay upon him, notwithstanding the technical form of the pleadings, and although the

^k 4 T. R. 475.

¹ *Ibid.*

^m *R. v. Knill*, 12 East, 50.

ⁿ The question who shall begin is not merely material as a rule of form and order, but as regulating the right to reply. It is considered in practice, and perhaps with reason, that it gives a party an advantage to have the opening and reply, for the purpose of having the first and also the latest opportunity of making an impression on the jury. Much evidence, no doubt, is often sacrificed to obviate or attain this advantage; for a defendant is in general disinclined to give the opportunity for a reply which may disturb the arguments which he has used, and also because he may frequently doubt whether he can sufficiently depend on the evidence which he is required to state to the jury, without having any opportunity of afterwards commenting on variances between the facts as stated and proved. Notwithstanding the importance of the question, whether the one party or the other has the right to begin, the decision of the point rests, in the first instance, with the Judge at Nisi Prius, and the Court above has refused, without good reason, to interfere with his decision; see *Phil. on Ev.*, vol. i. 833; *Hare v. Munn*, M. & M. 241; E. C. L. R. 22; *Fowler v. Coster*, *ibid.*; *Burrell v. Nicholson*, 6 C. & P. 202; E. C. L. R. 25; 1 M. & Rob. 304; *Williams v. Davies*, 1 Cr. & M. 464; *Scott v. Lewis*, 7 C. & P. 347; E. C. L. R. 32; *Brandford v. Freeman*, 5 Ex. 734; *Edwards v. Matthews*, 16 L. J., Ex. 291. But if his decision has done clear and manifest wrong, (*Huckman v. Fernie*, 3 M. & W. 517, corrected 5 Ex. 737; *Geach v. Ingall*, 14 M. & W. 95,) or some substantial inconvenience affecting the trial of the issue has been sustained, the Court will grant a new trial; *Ashby v. Bates*, 15 M. & W. 589; *Doe dem. Bather v. Brayne*, 5 C. B. 655; E. C. L. R. 57.

proof of the amount of his damages lay upon the plaintiff.^o Thus, where in action of trespass *quare clausum fregit*, the defendant as to the force and arms and whatever is against the peace, &c., pleaded not guilty; and as to the residue, a justification under a right of *597] way, the defendant was held to be *entitled to begin and to reply.^p So, in an action for a libel, where the only pleas alleging facts in justification, on which issues were joined;^q or in trespass, where the only plea consisted of matter of justification, alleging an act of bankruptcy to have been committed by the plaintiff, on which issue was joined.^r

A different rule has since been stated as a resolution of the *598] judges. In one report,^s Tindal, L. C. J., is stated *to have expressed himself as follows: "The judges have come to a

^o *Doe v. Lewis*, 1 C. & K. 122; E. C. L. R. 47.

^p *Jackson v. Heskeith*, 2 Stark. C. 520; E. C. L. R. 3; *per* Wood, B., and Bayley, J.; the general issue had been pleaded originally, but had been withdrawn during the assizes (the cause was in the county palatine court), for the purpose of giving the defendant's counsel a right to reply. So in *Hodges v. Holder*, 3 Camp. C. 366. And these decisions do not appear to be affected by the new rule mentioned below, substantial damages not being sought; see *Bastard v. Smith*, 2 M. & Rob. 129.

^q *Cooper v. Wakley*, Moo. & M. 248; E. C. L. R. 22. So in *Bedell v. Russell*, R. & M. 293; E. C. L. R. 21; where, to an action of battery, the defendant justified as captain of a ship in which the plaintiff was mariner, and issue being joined on the replication *de injuriâ*, it was held that the defendant was entitled to begin.

^r *Cotton v. James*, Moo. & M. 273; E. C. L. R. 22; 3 C. & P. 605; E. C. L. R. 14.

^s *Carter v. Jones*, 5 C. & P. 641; E. C. L. R. 24. The history of this resolution is thus given by Lord Denman, C. J., in *Mercer v. Whall*, 5 Q. B. 447; E. C. L. R. 48:—"Soon after I was raised to the bench this ruling (*i. e.* Lord Tenterden's, in *Cooper v. Wakley*,) became the subject of discussion among the Judges. Many of them attended at my house to consider it; and the following short resolution was drawn up and signed by those present, and afterwards adopted by Lord Lyndhurst, C. B., Bayley, B., Taunton, J., and myself: 'In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant.' I possess this document, signed with the initials of the present C. J. of the C. P. (Tindal), of Sir J. B. Bosanquet, and of the late Mr. J. Park, Littledale and Gazelee, Js., Bolland and Gurney, Bs. Among the Judges who adhered to this retraction of the decision in *Cooper v. Wakley* were the two whom I have named as assessors to Lord Tenterden when that decision was made (Bayley and Littledale, Js.). His own opinion may be gathered from what he said in *Cotton v. James*, Moo. & M. 273; E. C. L. R. 22. If ever a decision was overruled on great deliberation, and by an undeviating practice afterwards, it is that in *Cooper v. Wakley*." But the rule thus declared was confined to the case under consideration. Contented with the correction of an error, the Judges left the practice in actions of contract in its former state; *Ibid*.

resolution, that justice would be better administered by altering the rule of practice, and that in future the plaintiff should begin in all actions for personal injuries, and also in actions for libel and slander, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant. It is most reasonable that the plaintiff who brings his case into Court, should be heard first, to establish his complaint."^t

This rule was at first deemed to be confined to actions for personal or malicious injuries,^u such as assaults, libel and slander,^v malicious prosecution, and the like;^x and it was not considered to be sufficient in other actions, to bring a case within the rule that the amount claimed should be unliquidated,^y as in an action of covenant or assumpsit to recover damages for a breach of contract,^z *or of trespass to land or goods,^a or in an action of trover,^b [*599 or case.^c

But in one instance the rule was held to apply to an action for

^t In the report of the same case, in 1 M. & Rob. 281, the rule is stated thus: "A resolution has lately been come to by all the Judges, that in case of slander, libel, and other actions where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant."

^u In *Wooton v. Barton*, 1 M. & Rob. 518, Parke, B., said that the only rule laid down by the Judges was, that in actions for personal injuries where damages are sought, as in actions of assault, libel, and slander, the plaintiff should begin. Thus, in an action on a covenant for payment of money (*Wooton v. Barton*), or on a bill or note (*Cannam v. Farmer*, 3 Ex. 698,) where interest is only sought to be recovered as damages. But the case is different, if money has been paid into court, and there is an issue that the plaintiff has sustained greater damages; *Cripps v. Yates*, Car. & M. 489; E. C. L. R. 41; *Booth v. Millns*, 15 M. & W. 669; and see *Reeve v. Underhill*, 6 C. & P. 773; E. C. L. R. 25.

^v *Wooton v. Barton*. Even when the defendant suffered judgment by default as to part, and pleaded affirmatively to the residue; *Wood v. Pringle*, 1 M. & Rob. 277.

^x *Atkinson v. Warne*, 6 C. & P. 687; E. C. L. R. 25.

^y *Reeve v. Underhill*, 6 C. & P. 773; E. C. L. R. 25; *Lewis v. Wells*, 7 C. & P. 221; E. C. L. R. 32; *Wooton v. Barton*, 1 M. & Rob. 518.

^z *Reeve v. Underhill*, 6 C. & P. 773; E. C. L. R. 25; *Lewis v. Wells*, 7 Car. & P. 221; E. C. L. R. 32.

^a *Burrell v. Nicholson*, 6 C. & P. 202; E. C. L. R. 25.

^b See *Scott v. Lewis*, 7 C. & P. 347; E. C. L. R. 32.

^c *Chapman v. Emden*, 9 C. & P. 712; E. C. L. R. 38. Case for selling envelopes, &c., in imitation of those used by the plaintiff; plea, that those sold by the plaintiff were of an inferior kind. On issue joined on the replication of *de injuriâ* the defendant was held to be entitled to begin; *Rowland v. Bernes*, 1 C. & K. 46; E. C. L. R. 47.

breach of promise of marriage,^d an action of contract in substance as well as in form; and also to an issue taken on a plea in abatement.^e

And now it seems to be settled that the rule is the same in actions of contract and in actions of tort,^f and that wherever the amount which the plaintiff is entitled to recover is really in question, he is entitled to begin.^g Therefore, in an action of covenant, by an articted clerk against an attorney for dismissing him, the defendant having pleaded that the plaintiff conspired with another attorney, by unlawful means to induce the defendant's clients to leave him and employ the other, and in pursuance of that conspiracy *600] racy *disclosed the defendant's professional secrets to the other, and calumniated the defendant to his clients, whereby he was forced to discharge the plaintiff, and the plaintiff had traversed the whole plea, whereupon issue was joined; it was held that the plaintiff was entitled to begin, for the amount of damages was open.^h

So in assumpsit, on an agreement to take the plaintiff's son as a pupil and assistant in the defendant's profession of a surgeon, the grievance alleged being a wrongful dismissal for misconduct, the plaintiff on issue taken on a plea affirmatively alleging the misconduct is entitled to begin.ⁱ So in an action on a charter-party,

^d *Harrison v. Gould*, 7 C. & P. 580; E. C. L. R. 32; *Reeve v. Underhill*, 6 C. & P. 773; E. C. L. R. 25. But in *Stanton v. Paton*, 1 C. & K. 148—E. C. L. R. 47—upon an issue joined, on a plea in assumpsit for breach of promise of marriage that the parties mutually released each other, Lord Abinger, C. B., after consulting Patteson, J., held that the defendant was entitled to begin.

^e See Vol. II., tit. ABATEMENT; *Morris v. Lotan*, 1 M. & Rob. 233. In *Fowler v. Coster*, M. & M. 241; E. C. L. R. 22; and 3 C. & P. 463; E. C. L. R. 14; Lord Tenterden held, that wherever it appears on the record or from the statement of counsel that there is no real dispute as to the sum to be recovered, but the damages are either nominal or mere matter of computation, then, if the affirmative of the issue is on the defendant, he is entitled to begin; where, therefore, to an action on bills of exchange there was a plea in abatement of the non-joinder of others, it was held that the defendant ought to begin; and in assumpsit for goods sold, plea the non-joinder of another defendant, Alderson, B., held, that if the defendant would admit the debt, he was entitled to begin; *Bonfield v. Smith*, 2 M. & Rob. 519.

^f *Mercer v. Whall*, 5 Q. B. 447; E. C. L. R. 48.

^g *Hoggett v. Exley*, 9 Car. & P. 324; E. C. L. R. 38; 2 M. & Rob. 251. Thus, in assumpsit with a general plea of set-off, the plaintiff must begin, and prove the amount due.

^h *Mercer v. Whall*, 5 Q. B. 447; E. C. L. R. 48.

ⁱ *Wise v. Wilson*, 1 C. & K. 662; E. C. L. R. 47.

where the issue was whether the defendant had furnished a sufficient cargo, and the plaintiff after notice had refused to receive the cargo offered, the plaintiff was held to be entitled to begin, as he was to prove the amount of his damages.^j

If, too, there be any issue upon the record which it would be incumbent on the plaintiff to support by evidence, however minute may be the portion of the case to which it extends,^k if he be really proceeding and intend to found a claim upon it, he is entitled to begin. Thus, where any part of his claim is met by the general issue, he has a right to begin.^l And indeed wherever any material allegation in the declaration, though in form negative yet in substance affirmative,^m is denied by the defendant, the plaintiff must begin. Thus, in *assumpsit*, for not delivering hay of a certain quality; plea, that the *defendant tendered hay of that [601 quality, and that the plaintiff refused to receive it; it was held, that this being a traverse of an allegation in the declaration, the proof of the issue lay on the plaintiff.ⁿ So, in an action on a warranty of soundness of a horse, the declaration stating it to be unsound, and the defendant by his plea alleging it to be sound.^o

In an action on a policy of assurance; the declaration set out the policy, wherein it was stipulated that if anything stated by the assured to the company, previously to the execution of the policy, was untrue, the policy should be void; and the declaration contained an averment that the statements so made were true. The plea traversed the averment of truth, "in this, that the assured was afflicted with rupture," concluding with a verification, and the plaintiffs replied *de injuriâ*. It appeared in evidence that the assured made a statement that he had not been afflicted with certain diseases, including rupture; it was held that the plaintiffs were entitled to begin, and the judge having allowed the defendant

^j *Ridgway v. Ewbank*, 2 M. & Rob. 217; and see *Hoggett v. Oxley*, 2 M. & Rob. 251.

^k *Booth v. Millns*, 15 M. & W. 669; *Rawlins v. Desborough*, 2 M. & Rob. 328.

^l *Price v. Seaward*, Car. & M. 23; E. C. L. R. 41. But if the common counts to which the general issue is pleaded are merely added by way of precaution, and the plaintiff will not undertake to open a case on them, they will be no impediment to the defendant's right to begin; *Smart v. Rayner*, 6 Car. & P. 721; E. C. L. R. 25.

^m See the test suggested by Alderson, B., *ante*, p. 585, note (c); and *Amos v. Hughes*, there cited; *Osborn v. Thompson*, 2 M. & Rob. 254.

ⁿ *Crowley v. Page*, 7 Car. & P. 789; E. C. L. R. 32.

^o *Osborn v. Thompson*, 2 M. & Rob. 254.

to begin, a new trial was directed.^p So on an issue to try whether *A. B.* was at a certain time of sound mind, the plaintiff who affirms the soundness may begin.^q

In replevin, where the defendant avows for rent in arrear, and the plaintiff pleads in bar that the distress was not made within twenty years from the time when the right to make a distress accrued, and the avowant takes issue, the plaintiff must begin, as it lies upon him to prove when the distress was made.^r

*602] So the plaintiff has been held to be entitled to begin *in an action against a builder on a building agreement, the issue being whether it was executed according to the specification.^s Also in covenant for not leaving in repair; the plaintiff alleging that the premises were dilapidated, and the defendant that they were not.^t So in covenant where the declaration stated that the defendant covenanted to occupy the demised premises in a proper manner and to keep them in repair, and assigned as breaches that the defendant did not occupy in a proper manner, and did not keep the premises in repair, which were traversed.^u

But if in an action of trespass, or other like action to try a right, in which the whole of the pleas are in the affirmative, and the issues raised by them should be sustained by the defendant, the defendant is entitled to begin; unless the plaintiff's counsel will pledge himself that he is proceeding for more than nominal damages. Thus, where the action was trespass *q. c. f.*, and the plea alleged as a justification that the defendant committed the trespass in asserting a right, which right the plaintiff traversed; the plaintiff's counsel having claimed the right to begin, the judge asked whether he would undertake to proceed for substantial damages, and on his declining to do so allowed defendant to begin.^v

^p *Ashby v. Bates*, 15 M. & W. 589. In *Geach v. Ingall*, 14 M. & W. 95, the Court decided the same way, the only difference in the cases being that the plea in the latter concluded to the country. *S. P. Rawlins v. Desborough*, 2 M. & Rob. 76, 328; *Craig v. Fenn*, Car. & M. 43; E. C. L. R. 41; *contra*, *Pole v. Rogers*, 2 M. & Rob. 287.

^q *Frank v. Frank*, 2 M. & Rob. 314.

^r *Collier v. Clark*, 5 Q. B. 467; E. C. L. R. 48.

^s *Smith v. Davies*, 7 C. & P. 307; E. C. L. R. 32.

^t *Soward v. Leggatt*, 7 Car. & P. 613; E. C. L. R. 32; *Belcher v. M'Intosh*, 8 Car. & P. 720; E. C. L. R. 34; *per* Lord Denman, C. J., 1 M. & Rob. 440.

^u *Doe dem. Trustees of Worcester School v. Rowlands*, 9 Car. & P. 734; E. C. L. R. 38.

^v *Chapman v. Rawson*, 8 Q. B. 673; E. C. L. R. 55; *Fowler v. Coster*, *supra*, note. So in *Pearson v. Coles*, 1 M. & Rob. 206, where *lib. ten.* only was pleaded.

So, too, where the damages are liquidated or nominal, or the amount of the debt or damage is admitted on the pleadings, or is merely matter of simple calculation, and the only issues raised are alleged affirmatively by the defendant, not only in point of form but also of substance, there *the defendant is entitled to begin. Thus, in debt for goods sold and delivered, with a [*603 general plea of payment* only upon the record, the defendant was held entitled to begin. So, where the defendant pleaded his discharge under the Insolvent Debtor's Act, and the plaintiff, by his replication, denied the plea.^x So, in replevin upon an avowry for a distress for arrears of annuity, to which there was the plea that no memorial had been enrolled; replication, that a memorandum was enrolled, setting it out; rejoinder, that the memorandum did not truly state the names of the persons by whom the annuity was to be received, and the consideration; surrejoinder, that it did truly state both; the defendant was allowed to begin.^y

And the same was held in an action for a false return to a mandamus to restore a parish clerk, to which the defendant had returned that the plaintiff was addicted to habits of intoxication. The declaration in the action negatived these allegations in the return, which the defendant re-asserted in his plea affirmatively to be true.^z In a feigned issue, the plaintiffs averred that the goods in question were not the goods of them or either of them; and the defendant asserted that they were the goods of them, or one of them; Lord Abinger held that the defendant had the right on this issue to begin, as the affirmative lay upon him.^a

In ejectment, the lessor of the plaintiff, who must establish and recover on the strength of his own title, has generally the right to begin; but this in practice is subject to exceptions where the defendant admits the *prima facie* title of the plaintiff. Thus, if the lessor of the plaintiff claim as heir of A., and the defendant claim under a will made by A., if he will admit that A, died seised and

The Judge, when he has the means, will himself look at the facts to see whether substantial damages are or can be claimed; *Bastard v. Smith*, 2 M. & Rob. 129.

^w *Birt v. Leigh*, 14 M. & W. 177; *Richardson v. Fell*, 4 Dowl. 10; or set-off, see *Roche v. Chapman*, 1 Ex. 10; or coverture, *Woodgate v. Potts*, 2 C. & K. 457; E. C. L. R. 61.

^x *Lambert v. Hale*, 9 Car. & P. 506; E. C. L. R. 38.

^y *Hogarth v. Perring*, 1 C. & K. 608; E. C. L. R. 47.

^z *Bowles v. Neale*, 7 Car. & P. 262; E. C. L. R. 32.

^a *Hudson v. Brown*, 8 Car. & P. 774; E. C. L. R. 34.

*604] that *the lessor is his heir he is entitled to begin.^b He must however admit the *whole primâ facie* title without any qualification, and admitting only a portion of it, or admitting it only hypothetically, will not suffice. Thus, in the case above suggested, if the defendant claim under a conveyance by *A.* in his lifetime, instead of his will, he is not entitled to begin, for by admitting the heirship, and seisin of *A.*, unless defeated by the conveyance, he does not absolutely admit the seisin of the ancestor at the time of his death;^c so, if the defendant found his title even in part under a marriage settlement of the ancestor, for then he does not admit the title as to the whole;^d and, if the defendant claim himself as heir, he cannot by admitting the lessor to be the heir *unless* he is so, entitle himself to begin.^e It was formerly thought, and it has been held in some instances,^f that if the lessor claimed under a will, and

*605] *the defendant under a later will or codicil, the defendant was entitled to begin, if he admitted the *primâ facie* case of the lessor; but these cases have been overruled by a recent decision,^g where the subject was fully discussed in *banc*. In such a case it is evident the defendant does not admit the whole of the lessor's case. That case is, that the will was a subsisting will at the time of the ancestor's death; or rather, in truth, that the ances-

^b *Goodtitle v. Braham*, 4 T. R. 497; *Doe v. Smart*, 1 M. & Rob. 476; *Fenn v. Johnson*, cited M. & M. 168, n.; E. C. L. R. 22; Adams on Eject. 3d edit. 288, where Le Blanc, J., and Wood, B., so ruled on several occasions. But on another occasion, Gibbs, J., held that the admission did not give the defendant the right to begin. In the case of *Doe v. Barnes*, 1 M. & Rob. 386. *Sophia Richards*, the sister and heiress of *John Clavel*, took possession of premises of which he died seised; the lessors were her devisees of the premises and her heir-at-law, who was also heir-at-law of *John Clavel*. Lord Denman ruled that the defendant admitting those facts, and that the plaintiff was entitled to the property, unless he, the defendant, proved the will of *John Clavel*, was entitled to begin.

^c Where in ejectment by the heir-at-law to recover premises conveyed by the deceased ancestor under a deed which was impeached on the ground of his incapacity at the time of execution, held, that as the seisin of the ancestor at the time of his death was not admitted, the mere admission of the lessor's title as heir by pedigree did not entitle the defendant to begin; *Doe v. Tucker*, M. & M. 536; E. C. L. R. 22; *Doe v. Smart*, 1 M. & Rob. 476.

^d *Doe v. Lewis*, 1 Car. & K. 122; E. C. L. R. 47.

^e *Doe v. Bray*, M. & M. 166; E. C. L. R. 22. Where each party claimed as heir-at-law, and the defendant, if legitimate, was clearly heir, it was held, (by Vaughan, B.,) that an admission by him, that unless he were legitimate, the lessor of the plaintiff was the heir-at-law, did not entitle the defendant to begin.

^f *Doe v. Corbett*, 3 Camp. 368; *Doe v. Barnes*, *supra*.

^g *Doe dem. Bather v. Brayne*, 5 C. B. 655; E. C. L. R. 57.

tor devised it, and the admission is no admission of that fact, but at most only a qualified one of the lessor's title, viz., *unless* defeated by the subsequent will.¹

It seems to be discretionary in the judge, whether, after the plaintiff has closed his case, and the defendant's counsel has commenced his address to the jury, the plaintiff's counsel can be allowed to go into a new case.² In a penal action the court will not permit a defect in the plaintiff's case to be supplied, unless it has arisen merely from inadvertence on the part of the plaintiff's counsel.³

Where there are several issues, the proof of some being incumbent on the plaintiff, and of others on the defendant, it is usual for the plaintiff to begin,⁴ and to prove those which are essential to his

¹ *Per* Le Blanc, J., *Edwards v. Sherratt*, 1 East, 614.

² *Aldred v. Halliwell*, 1 Stark. C. 117; E. C. L. R. 2; *cor.* Lord Ellenborough. Generally, the Judge will allow witnesses to be called to obviate any objection beside the merits of the case, even after the party's case is closed; *Giles v. Powell*, 2 Car. & P. 259; E. C. L. R. 12.

³ *James v. Salter*, 1 M. & Rob. 501; *Curtis v. Wheeler*, M. & M. 493; E. C. L. R. 22; *Williams v. Thomas*, 4 C. & P. 234; E. C. L. R. 19; *Jackson v. Hesketh*, 2 Stark. C. 518; E. C. L. R. 3; *Booth v. Millns*, 15 M. & W. 669; see *Mercer*

⁴ It is a general rule that the plaintiff who has the burden of proof shall have the general reply or closing argument and the only exception is where the defendant by his plea, admits the whole cause of action stated in the declaration, and undertakes to remove or defeat it by the matter set up in his bar; *Ayré v. Austin*, 6 Pick. 225; see also *Abat v. Signa*, 5 Mart. N. S. 75. And where the defendant pleads the general issue in connection with a special plea which admits the cause of action, the right of reply will belong to the plaintiff, although the defendant should waive the general issue; *Ayre v. Austin*, 6 Pick. 225. In an action of trespass *qua. claus. freg.* if the defendant plead soil and freehold in himself upon which issue is joined and there be no other plea, he has the affirmative, and will have the right of opening and closing; *Davis v. Mason*, 6 Pick. 156. Where the probate of a will is opposed on the ground that the testator when he executed it was not of sane mind the burden of proof in the first instance, is on him who offers the will for probate, and he will accordingly be entitled to the opening and closing argument; *Brooks v. Barrett*, 7 Pick. 94. "Although in most cases where the defendant pleads merely an affirmative plea, he is by the course of practice entitled to the conclusion, yet the plea of property, as I apprehend, does not produce this effect in the action of replevin. The plaintiff I think must, notwithstanding, first prove that he has a right to maintain his writ of replevin by showing that he has either an absolute or special property in himself." *Per* Kennedy, J., in *Marsh v. Pier*, 4 Rawle, 283. Where counsel rose to address the jury, and the judge told him he should charge against him, and he did not therefore address the jury, it was held that this was a voluntary relinquishment of the right to address them, not compelled by the decision of the judge; *Jackson v. Cody*, 3 Cow. 140.

case, and then the defendant does the same, and afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs; the defendant's counsel is entitled to a reply
 *606] upon such evidence,^k in support of his own affirmatives, *and the plaintiff's counsel to a general reply. Where, however, there are issues involving different transactions, the proof of one of which is incumbent on the plaintiff, and the proof of the other of which is incumbent on the defendant, some difference has obtained in practice¹ on the question whether the plaintiff be bound to go into evidence, as part of his own case, to negative the defendant's case, as well as affirmatively to establish his own. According to the later authorities it is now settled that he is not bound to enter on any such negative evidence in the first instance, but may waive his proof until the defendant has exhausted his affirmative evidence in support of his own case. But it is also laid down, that if the plaintiff elect to enter at all into such negative evidence in the first instance, he must then produce the whole of that evidence, and that he cannot in such case be permitted to adduce negative evidence generally in reply. Where to a declaration for a libel the defendant pleaded the general issue, and several pleas of justification, it was held that the plaintiff might, if he chose, go into evidence in the first instance to negative the pleas of justification, but that he could not go into part of such evidence in the first instance, and adduce the remainder in reply to the defendant's
 *607] case.^m Although *there be in fact several issues, as where in an action of assault and battery the defendant pleads not

v. *Whall*, 5 Q. & B. 447; E. C. L. R. 48. A party has a right to have all the issues tried, although one which goes to the whole cause of action or defence is proved against him by his own witness; *Fry v. Monckton*, 2 M. & Rob. 303.

^k *Meagoe v. Simmons*, 3 Car. & P. 75; E. C. L. R. 14; M. & M. 121; E. C. L. R. 22.

¹ See *Rees v. Smith*, 2 Stark. C. 31; E. C. L. R. 3; where in an action of trespass, *q. c. f.*, &c., to which the defendant had pleaded the general issue, and pleas of justification. Lord Ellenborough stated the rule to be, that where by pleading, or by reason of notice the defence was known, the counsel for the plaintiff was bound to open the whole case in chief, and could not proceed in parts. And his Lordship held the same doctrine in the case of bills of exchange, where a notice had been given of the intention to dispute the consideration; *Delauney v. Mitchell*, 1 Stark. C. 439; E. C. L. R. 2; see also *Spooner v. Gardiner*, R. & M. 86; E. C. L. R. 21.

^m *Brown v. Murray*, R. & M. 254; E. C. L. R. 21; *cor.* Lord Tenterden, C. J. His Lordship had previously ruled to the same effect in *Sylvester v. Hall*, Sitt. after Trin., July, 1825; where, to an action for trespass and false imprisonment, the defendant had pleaded the general issue, and also several pleas in justification.

guilty, and *son assault demesne*; yet, if the defence consists of distinct collateral matter, the negative of which requires no proof from the plaintiff in the first instance, notwithstanding the plaintiff had notice of the defence intended to be set up, it is not necessary for him to go into any evidence in answer to that defence, until the defendant has, by his proof, called upon him for a reply; this appears to be a matter of practical convenience, subject to the discretion of the Court.^a It is possible that the defendant may

Parke, J., ruled accordingly in *Roe v. Day*, 7 C. & F. 707; E. C. L. R. 32. On the trial of an action for not setting out tithes, some questions were asked of the plaintiff's witnesses, on cross-examination, as to the land being barren, and on re-examination swore as to its fertility. The defence was, that the land was barren. On evidence being given by the defendant to this effect, the plaintiff was allowed to give evidence in reply; *Greswolde v. Kemp*, Car. & M. 635; E. C. L. R. 41.

^a Lord Tenterden, C. J., adopted this course, and allowed a plaintiff to give evidence in answer to a defence in an action on a bill that there was no consideration, after notice of the intended defence; Sitt. after Hil. 1820, at Westminster; provided no suspicion has been cast on the plaintiff's title by cross-examination of plaintiff's witnesses; R. & M. 255; E. C. L. R. 21, *supra*; See Vol. II. tit. BILLS OF EXCHANGE; *Spooner v. Gardiner*, R. & M. 84; E. C. L. R. 21. Where the plaintiff made out a *prima facie* case in ejectment as heir-at-law, and the defendant set up a claim under a will, the plaintiff was allowed to prove a claim under a subsequent will; *Doe v. Gosley*, 2 M. & Rob. 243. *Williams v. Davies*, 1 C. & M. 464, was a case where there were cross demands, and a set-off was pleaded; it was held that the plaintiff need not in the first instance prove more than the balance which he claimed, and that after the defendant had proved his set-off, the plaintiff might prove other sums to be due, so as to cover the set-off; and Lord Lyndhurst, C. B., said either way of proceeding may be correct, and it must be left to the discretion¹ of the Judge to admit the evidence or not. In *Wright v. Wilson*, 18 L. J., C. P. 333, the defendant having introduced a new and material fact not alluded to in the plaintiff's case as it appeared in evidence or in the pleadings, the plaintiff was allowed to produce evidence in answer to it, and the court objected to any general rule, saying it was in the discretion of the Judge and subject to the review of the court. The plaintiff in ejectment made out a *prima facie* case, by showing that the defendant came into possession under his tenant. The defendant giving evidence to show that a piece of garden ground, part of the disputed premises, was demised to him by his father, the plaintiff was admitted to show in reply rent received for the land by himself and his predecessor for forty years; *Doe v. Mobbs*, 1 Car. & M. 1; E. C. L. R. 41. So, in trespass for taking the plaintiff's goods, where the pleas were not guilty, a traverse of the plaintiff's property, and that they were distrained after being fraudulently removed to avoid a distress, and the plaintiff at the trial proved the trespass and his right to the goods, and the defendant gave evidence of the fraudulent removal; it was held that the plaintiff might prove, in reply, that the defendant had parted with his reversion before the removal; *Ashmore v. Hardy*, 7 C. & P. 501; E. C. L. R. 32. Lord Ellenborough usually required the plaintiff under such circumstances to go at once into the whole of his case.

*608] *not be able to establish any case, and thus time may be saved by postponing the plaintiff's reply; besides, until the defendant has adduced such evidence, it cannot be known with any certainty to what points the plaintiff is to adduce his evidence in reply.

After the defendant has adduced his evidence the plaintiff's counsel at once proceeds, without any observations, to tender any evidence he may have in reply; but such evidence must be confined by negating specific acts sworn to by the defendant's witnesses, the proof of which he could not be expected to have anticipated, or to answer the defendant's case, where he has not attempted to negative that case in the first instance. He cannot be allowed to adduce evidence which he might have given in support of his own case in the first instance.* Upon the evidence

* Thus, where the plaintiff sued as indorsee of a bill of exchange, and on a traverse of the indorsement relied in the first instance on a *prima facie* case by merely giving evidence of the defendant's handwriting. The defendant then proved that the plaintiff was too poor to have discounted the bill, and denied all knowledge of it, and had said that the action was not brought by his authority; it was held, that the plaintiff in reply could not produce evidence to show that he had the means of discounting the bill and had in fact done so, for the fresh evidence was merely confirmatory of the plaintiff's case; *Jacobs v. Tarleton*, 11 Q. B. 421; E. C. L. R. 63.

So if the prosecutor give evidence to prove that a robbery was committed by the prisoner, he cannot, upon an *alibi* being set up, prove that he was not at the other place, but near the spot where the robbery was committed; *R. v. Hilditch*, 5 C. & P. 299; E. C. L. R. 24. But in case for negligent driving at *L.*, the plaintiff having given evidence to show he was near the spot at the time in question, the defence set up an *alibi* at *R.* It was held, that this being a new fact disclosed in the defence the plaintiff might call in evidence in contradiction to show that he was at *L.*, although the general nature of the defence had been disclosed by the cross-examination; *Briggs v. Aynsworth*, 2 M. & Rob. 168.

In a prosecution, however, for larceny, the case for the Crown was, that the goods were stolen and found in possession of the prisoner. For the defence, his daughter proved that he bought them of *A.* The prosecutor called *A.*, and attempted to prove by him that he had seen the prisoner steal them; but he was confined by the court to the question whether he had sold them; *R. v. Stimpson*, 2 C. & P. 415; E. C. L. R. 12. So, in an action on a builder's bill, the defence was that the charges were too high, and the defendant called a surveyor who said they were £100 too high, when the plaintiff offered a letter written on the defendant's part by his attorney some time before, complaining that his surveyor thought them £60 too high; but Lord Tenterden held that it was not properly evidence in reply; *Knapp v. Haskall*, 4 C. & P. 590; E. C. L. R. 19. So, in an action for the negligent driving of the defendant's servant, whereby the plaintiff's goods were injured, being then in the possession of his servant; the witness who proved it was cross-examined with a view to show that they were the property of *P.*, and

thus adduced in *reply the defendant's counsel has then a right to comment, but his observations must be confined to that *matter, for upon the plaintiff's original case and his own evidence he has already commented. The plaintiff is then entitled to the general reply. [609] [610]

Such is the course where the plaintiff begins; but where the proof lies upon the defendant alone, he is entitled to begin,^p the order of proof is reversed, and his counsel becomes entitled to the reply. Thus where the lessor of the plaintiff claimed as heir-at-law and the defendant as devisee, and the latter admitting the lessor's title as heir opened a new case, which the plaintiff answered by evidence; it was held, that the defendant was entitled to the general reply.^q The title of the lessor as heir being once admitted, the effect as to the order of proof was the same as if it had not been disputed at all; and consequently, the whole issue lying upon the defendant, he was in the same situation with a plaintiff in ordinary cases, and entitled to begin.^r

witnesses were called for the same object; a witness was allowed to be called by the plaintiff, in reply, to prove that the goods were not *P.*'s, but not to prove that they were the plaintiff's; *Whittingham v. Bloxham*, 4 C. & P. 597; E. C. L. R. 19; and see *Rowe v. Brenton*, 3 M. & R. 133; *Roe v. Day*, 7 Car. & P. 705; E. C. L. R. 32; *Brown v. Murray*, Ry. & M. 254; E. C. L. R. 21. Where *A.* was called by the defendant to prove conversations between the plaintiff and the defendant's agents, cutting down the plaintiff's claim; it was proposed by the plaintiff, after the defendant's case was closed, to call *B.* in order to contradict *A.*; and this course was allowed, notwithstanding that the course of cross-examination by the defendant's counsel gave notice of his case, so that the plaintiff might have called *B.* in the first instance. But the examination of *B.* was confined to what took place on any occasion when *A.* admitted that *B.* was present; *Cope v. Thames Haven Dock Company*, 2 C. & K. 757; E. C. L. R. 61. So, although a prosecutor cannot call witnesses to strengthen his case, he may to contradict the prisoner's witnesses; 2 Lew. C. C. 151. Where a prisoner on his trial makes a defence repugnant to that made by him on his examination before the committing magistrate, the latter not having been given as evidence in chief cannot, it has been said, be proved to contradict the prisoner's witnesses; *R. v. Powell*, Car. & M. 500; E. C. L. R. 41.

^p See *ante*, pp. 602, 603.

^q *Goodtitle dem. Revett v. Braham*, on a trial at bar; 4 T. R. 497. From the report of this case it appears that the whole case went to the jury on the defendant's title as devisee, the lessor's title as heir being admitted; and see *Fenn v. Johnson*, Adams' Eject. 4th ed. *Doe dem. Corbett v. Corbett*, 3 Camp. 368, *ante*, p. 604. But where the plaintiff in such a case is put to proof of his pedigree, it seems to be clear that he may, at his election, go into proof to controvert the defendant's supposed case, and he would then be entitled to the general reply; see *Doe dem. Bather v. Braye*, 5 C. B. 655, *supra*, p. 605; E. C. L. R. 57.

^r See *ante*, p. 604.

*611] In civil, and now also in criminal cases,^a the party, *in addition to the evidence which he adduces, (the *probatio in artificialis* of the Roman law,^b is entitled to the aid of the comments and arguments of counsel,^c the *probatio artificialis*.) as applied to the evidence in general. The counsel for the plaintiff^x has an opportu-

^a Upon indictments for misdemeanors the defendant's counsel was always entitled to address the jury, and the same privilege was conferred by 7 Will. III. c. 3, in cases of treason within that statute; and in cases of felony and summary convictions by 6 & 7 Will. IV. c. 114, ss. 1, 2. After a prisoner's counsel has addressed the jury, the prisoner cannot be heard himself; *R. v. Boucher*, 8 C. & P. 141; E. C. L. R. 34; *R. v. Rider*, *ibid.*, 539. He cannot have the privilege of two statements, one by himself and another by his counsel; *R. v. Burrows*, 2 M. & Rob. 124. But where no one was present at the time to contradict the prosecutor's statement the prisoner has been allowed to make his own statement before his counsel addressed the jury; *R. v. Malings*, 8 C. & P. 242; E. C. L. R. 34.

^b Quintil. lib. 5, c. 8. According to the practice of the ancient Roman law, the advocate was entitled to make a perpetual running comment upon the testimony of the witnesses, and the documentary evidence as it was adduced. Formerly, in our own Courts, the junior as well as the senior counsel addressed the jury; and the form is still preserved in trials for high treason.

^c The object of the opening of a case by counsel is to give the jury a general notion of what will be given in evidence; but a statement of a fact by him does not in itself alone give the opposite party a right to use it as a fact in the cause; *per* Pollock, C. B., 1 C. & K. 684; E. C. L. R. 47. Where a party in a civil suit conducts his own case, it has been said that counsel cannot be heard for him on points of law; *Moscato v. Lawson*, 7 C. & P. 328; E. C. L. R. 32; *Shuttleworth v. Nicholson*, 1 M. & Rob. 251. Nor can the same person act as advocate and give evidence as a witness; *Stones v. Byron*, 4 D. & L. 393. Counsel also cannot be heard for a witness on the point, whether on an objection made by a witness to a question he is bound or not to answer it; *R. v. Adey*, 1 M. & Rob. 94. When points of law arise in the course of a cause, all the counsel are heard upon it; but the leading counsel only replies: of course, when the defendant's counsel applies for a nonsuit, and is answered by the plaintiff's counsel, the reply is on the law only; *Arden v. Tucker*, 1 M. & Rob. 192. Upon the question as to the right to begin, one counsel only is heard; *Rawlins v. Desborough*, 2 M. & Rob. 70; see *Bastard v. Smith*, *ibid.* 130.

^x The counsel for a plaintiff labours under a disadvantage in commenting upon his evidence before it has been given; it is frequently hazardous to lay much stress upon facts which afterwards may not be proved, and it not unfrequently happens that the proof varies so much from the statement as to render his comments and inferences irrelevant, and sometimes even injurious. The same observations apply to the defence, where the defendant calls witnesses: his counsel addresses the jury upon the case to be made out for the defendant, and upon the contradiction to be given to the plaintiff's witnesses hypothetically, upon the supposition that all which is stated will be proved; he stands therefore in a most hazardous situation with reference to the plaintiff's counsel, who has the opportunity of commenting on the whole case, not conditionally and subject to the contingency that the very founda-

nity for such *comments in stating his case to the jury.⁷ When the plaintiff's case has been concluded, the defendant's counsel in his turn observes upon the evidence given, and also on that which he intends to adduce;⁸ and after the defendant has exhausted his evidence, the plaintiff's counsel replies.^a And thus each party

tion on which his arguments rest may sink from under him, but with a full and certain knowledge of all the evidence in the cause. This practice not unfrequently induces a defendant's counsel to waive his defence by witnesses, and to rely on the infirmity of the plaintiff's case, rather than give his counsel the opportunity of replying. This is a practice attended with considerable inconvenience, inasmuch as it frequently excludes from the view of the Court and jury circumstances which might materially assist them in attaining to a correct conclusion in law and in fact, and it has justly led to a conviction on the part of many eminent persons that the practice ought to be altered.

⁷ In criminal cases the duty of the counsel for the prosecution is to assist in the furtherance of justice, without considering himself as acting for any party; *R. v. Thursfield*, 8 C. & P. 269; E. C. L. R. 34. And if there be no counsel regularly retained for the prosecution, but the depositions are by direction of the Court handed to counsel, he should consider himself as counsel for the Crown, and act in all respects as if instructed by the prosecutor, not as mere assistant to the Judge in examining the witnesses; *R. v. Littleton*, 9 C. & P. 671; E. C. L. R. 38. He should open the case for the prosecution wherever there is counsel for the prisoner; *R. v. Gascoine*, 7 C. & P. 772; E. C. L. R. 32; or the circumstances of the case are peculiar; *R. v. Bowler*, *ibid.* 773. In so doing he may state declarations made by the prisoner as well as facts; *R. v. Hartel*, 7 C. & P. 773; E. C. L. R. 32; *R. v. Orrell*, 1 M. & Rob. 467; 7 C. & P. 774, *S. C.*; E. C. L. R. 32; may read the general observations of a Judge, made some years before, on the nature and effect of circumstantial evidence, using them as his own opinions and as part of his own address; *R. v. Courvoisier*, 9 C. & P. 362; E. C. L. R. 38; and may put hypothetically the case of an attack upon the character of a witness for the Crown, and state that if made he shall be prepared to rebut it; *Ibid.*

⁸ But the counsel for a prisoner in a criminal case cannot state the prisoner's story, or anything which he is not in a condition to prove; *R. v. Beard*, 8 C. & P. 142; E. C. L. R. 34.

* Since the passing of the Prisoners' Counsel Bill, 6 & 7 Will. IV., c. 114, the following rules on this subject have been made by the Judges; 7 C. & P. 676; E. C. L. R. 32; 2 Lew. C. C. 262:—"If the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not; cases may occur in which it may be fit and proper so to do. In cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are in strictness entitled to the reply, although no evidence is produced on the part of the prisoner." They may in strictness do so, although the evidence on the part of the prisoner be only to character; *R. v. Stannard*, 7 C. & P. 763; E. C. L. R. 32; although the Court will recommend the right to be exercised only under special circumstances; *Ibid.* And the reply may be not on the evidence to character only, but on the whole case; *R. v. Whit-*

*613] has an opportunity of *commenting upon the whole of the evidence.^b If the defendant's counsel merely comment on the plaintiff's case, and adduce no evidence,^c the plaintiff's counsel *614] cannot *reply, for he has already been heard. Where the plaintiff adduces fresh evidence in contradiction of some new facts stated by the defendant's witnesses,^d it is unnecessary to preface such evidence by observations; for, after the defendant's counsel has observed upon the evidence in contradiction, the plain-

ing, 7 C. & P. 771; E. C. L. R. 32. But on an indictment against two for stealing sheep and two for receiving them, the latter of whom alone called witnesses, it was held, that although the counsel for the prosecution was entitled to the general reply, he was bound to confine it to the case of the party calling witnesses; *R. v. Hayes*, 2 M. & Rob. 155. And where *A* was indicted for feloniously abusing a girl under ten years of age, and *B* for aiding and abetting, and *A*'s counsel called no witnesses, but *B*, who had no counsel, called a witness to prove an *alibi* for *A*, it was held, that this was evidence for *A*, and the counsel for the prosecution might reply on the whole case, but should exercise his right with great forbearance; *R. v. Jordan*, 9 C. & P. 118; E. C. L. R. 38.

^b Where a plea has been demurred to, and judgment given for the plaintiff, and the *venire* is as well to try the issue joined as to assess damages upon the plea demurred to; the defendant's counsel cannot comment on the facts contained in that plea as admitted; *Ingram v. Lawson*, 2 M. & Rob. 253; but see *Gregory v. Duke of Brunswick*, 1 C. & K. 24; E. C. L. R. 47.

^c But if the defendant's counsel state facts which he proposes to prove, and afterwards declines to call witnesses, the prevalent opinion seems to be, that the plaintiff's counsel is entitled to reply; *R. v. Bignold*, 1 Dow. & Ry. C. 59; E. C. L. R. 16; *R. v. Horne*, 20 Howell's St. Tr. 662; *R. v. Carlisle*, 6 C. & P. 636; E. C. L. R. 25; *Faith v. M'Intyre*, 7 C. & P. 44; E. C. L. R. 32. There the counsel for the defendant having proved a document on cross-examination, read it as part of his speech, and Parke, B., intimated, that in point of good faith it ought to be put in, which was done, and the plaintiff's counsel replied. In *Crerar v. Sodo*, M. & M. 86,—E. C. L. R. 22,—Lord Tenterden, C. J., and in *Naish v. Brown*, 2 C. & K. 219,—E. C. L. R. 61,—Pollock, C. B., held, that the allowing a reply in such a case was discretionary on the part of the Judge; the object being to prevent injustice by the statement of facts not intended to be proved. An account-book having been put into the witness's hands to refresh his memory, the opposite counsel made observations as to the state in which it was kept; but this was held not to give a right to reply; *Pullen v. White*, 3 C. & P. 434; E. C. L. R. 14. Nor does evidence given by a defendant to satisfy the Judge merely, *e. g.* to show the inadmissibility of secondary evidence, entitle the plaintiff to a reply; *Harvey v. Mitchell*, 2 M. & Rob. 366. In crown and revenue cases the Attorney-General and those who represent him have a right to reply, although no evidence be given by the defendant. Wherever the king's counsel appear officially they have this right; *R. v. Gardner*, 1 C. & K. 635; E. C. L. R. 47; and note; see note (a), *supra*.

^d See *supra*, p. 608, note (o), as to what evidence the plaintiff may adduce in reply.

tiff's counsel is entitled to a general reply. And in such case the defendant's counsel may be heard, but he is not entitled to reason upon the whole of the evidence, he must confine his remarks to the subject of contradiction only, having already made his observations on the supposition that his witnesses would be believed, and his case established.

Where documentary evidence is tendered which is *prima facie* admissible, the opposite party cannot, it has been said, at that stage introduce independent evidence to show that it is inadmissible, such evidence being part of his own case.^o But this would seem to be erroneous,^f and *if it be necessary, in order to introduce [*615 secondary evidence, to prove possession of a document by the adversary, he may from the nature of the case produce evidence to show that he had not possession of it.^g

If several defendant's appear by different counsel, the issues on their respective pleas being the same, and they are in the same interest, only one counsel can be heard for all.^h Thus, upon a joint plea of not guilty, the counsel of each defendant cannot separately cross-examine or address the jury.ⁱ Where the defendants in ejectment appeared by different attorneys and counsel, but they supported the same title, only one of these counsel was allowed to address the jury.^j One of two defendants in trover appeared by counsel, and the other in person; it was held, that the defence being joint and by one attorney, the counsel only could address the jury, but the party might cross-examine the witnesses.^k But where parties appear by separate attorneys and

^o *Jones v. Fort*, M. & M. 196; E. C. L. R. 22; *Field v. Woods*, 7 Ad. & E. 114; E. C. L. R. 34. But this rule was said to be subject to the discretion of the Judge in the particular case; see M. & M. 197, n.; E. C. L. R. 22.

^f The old ruling can hardly be supported, when it is remembered that such evidence is not evidence in the cause, but for the Judge on a collateral and incidental question upon which he ought to hear the whole evidence on both sides and determine, before the evidence is admitted; *Cleave v. Jones*, Hereford Sum. Ass. 1851, where Erle, J., admitted evidence on the *voir dire* to show that a document was inadmissible as being a privileged communication to an attorney; and see *Jacobs v. Laybourn*, 11 M. & W. 685; *Attorney-General v. Hitchcock*, 1 Ex. 95, per Parke, B., and next note.

^g *Harvey v. Mitchell*, 2 M. & Rob. 366; and see 5 Q. B. 187; E. C. L. R. 48; *Smith v. Sleep*, 1 C. & K. 48; E. C. L. R. 47.

^h *Nicholson v. Brook*, 2 Ex. 214; *Sparkes v. Barrett*, 8 C. & P. 442; E. C. L. R. 34; *Mason v. Ditchbourne*, 1 M. & Rob. 462; 4 Camp. 174.

ⁱ *Seale v. Evans*, 7 C. & P. 593; E. C. L. R. 32.

^j *Doe v. Tindale*, 3 C. & P. 565; E. C. L. R. 14.

^k *Perring v. Tucker*, M. & M. 391; E. C. L. R. 22.

counsel, and their interests are distinct, the counsel for each may cross-examine and address the jury.¹ And where, after a plea in abatement for nonjoinder of *P.* and others, the plaintiff brought an action including them, to which action *P.* pleaded separately *non assumpsit*, the counsel for the original defendants proposed to prove that *P.*'s counsel should address the jury *after* the proposed evidence was given.^m

*616] *A plaintiff is not precluded from recovering on any demand to which he shows himself to be legally entitled by the allegations on the record and the evidence, although his counsel may not, in opening his case to the jury, have insisted on that demand. Thus, in an action on a policy of insurance with the money counts, where the defendant showed that the risk had never commenced; it was held that the plaintiff was entitled to the premium, although no claim had been made to it originally by his counsel.^{mm}

Where there are several issues on pleas by different defendants, and one will decide the whole case, but the other will not, the former ought to be tried first: as where one pleads in abatement, and the other pleads to the action; or where one pleads to the action,ⁿ and the other a matter personal to himself;^o or where in trespass one pleads a release, the other not guilty or a justification.^p Where there are many issues the court may order them to be tried separately.^q

The order of priority in addressing the jury by different counsel for different defendants, and proceeding with their cases, seems to be matter for the discretion of the judge.^r On the trial of an issue from Chancery by plaintiff, against *A. B.* and *C. D.*, to try whether the plaintiff was next-of-kin to *J. S.*, *A. B.* claimed to be as nearly related to *J. S.* as the plaintiff was, *C. D.* set up a claim inconsist-

¹ *Ridgway v. Phillip*, 1 C. M. & R. 415; *King v. Williamson*, 3 Stark. C. 162; E. C. L. R. 3; *Massey v. Goyder*, 4 C. & P. 162; E. C. L. R. 19; and see *Ewbank v. Nutting*, 7 C. B. 797; E. C. L. R. 62.

^m *Beale v. Moulds*, 1 C. & K. 1; E. C. L. R. 47.

^{mm} *Penson v. Lee*, 2 B. & P. 330.

ⁿ Co. Litt. 125; Bro. Trial, pl. 1, pl. 48; 2 Rol. Abr. 627; Bac. Abr. Trial, K.

^o Co. Litt. 125; 2 Rol. Abr. 628, pl. 7.

^p *Ib.*; Bro. Trial, pl. 48; Bac. Abr. Trial, K.

^q *Kemp v. Mackerill*, Sayer, 131.

^r *Fletcher v. Crosbie*, 2 M. & Rob. 417. In criminal cases the Court will call on the counsel for different defendants in the order they stand on the record, unless they otherwise agree; *R. v. Barber and others*, 1 Car. & K. 434; E. C. L. R. 47.

ent with both of them; held that at the close of the plaintiff's case *C. D.* must both open and prove his own case, and that then *A. B.* should do the like, the plaintiff having the general reply to both.^s

*2ndly. As to the nature, quality, and quantity of the evidence to be adduced by the parties.^t [*617]

In the first place, with respect to the nature of the evidence; as the business of trial is to ascertain the truth of the allegations put in issue,^u no evidence is admissible which does not tend to prove or disprove the issue joined. Thus, in an action of trespass for battery, the defendant cannot, under a plea of not guilty, prove that the plaintiff committed the first assault, for that is not the issue.^v

And in an action of trespass for assault and battery, under a plea of moderate correction of an apprentice for misconduct, and a general traverse of the plea (*de injuriâ*), it was held that the only question was whether the plaintiff had misconducted himself as an apprentice, and that *evidence if excess in the correction was not admissible as the excess was not in issue.^x [*618]

But although remote and collateral facts, from which no fair and

^s *Phillips v. Willetts*, 2 M. & Rob. 319.

^t The nature of the evidence necessary to prove particular issues will be considered at large in Vols. II. and III.

^u Prefatory allegations not denied must be taken to be true, and proof of them by the plaintiff is not admissible. *Gwynne v. Sharpe*, 1 Car. & M. 532; E. C. L. R. 41. An issue ought not to be allowed by the Court to be tried at *nisi prius* which is not raised by the pleadings, unless the parties amend them; *Ellison v. Isles*, 11 A. & E. 665; E. C. L. R. 39.

^v So where, in ejectment by a landlord against a tenant for breach of covenant, particulars of the breaches being given in selling hay and straw off the premises, removing manure and non-cultivation, the plaintiff cannot show a breach of covenant by mismanagement in overcropping, or deviating from the usual rotation of crops; *Doe dem. Winnall v. Broad*, 2 M. & G. 523; E. C. L. R. 40. Evidence cannot be received even of admissions of a party, if they are not relevant to the issue raised by the pleadings, so that he may have an opportunity of contradicting them; *Austin v. Chambers*, 6 Cl. & F. 4; *Copland v. Toulmin*, 7 Cl. & F. 350; *Attwood v. Small*, 6 Cl. & F. 234. In an action for a malicious prosecution for perjury, where the indictment contained two assignments of perjury, if the plaintiff at the trial of the action confine his case to one of them, the defendant is not entitled to prove that there was reasonable and probable cause for the charge contained in the other assignment; *Ellis v. Abrahams*, 8 Q. B. 709; E. C. L. R. 55. It is no objection to evidence tending to prove a criminal charge that it also proves another criminal charge; *R. v. Dossett*, 2 C. & K. 306; E. C. L. R. 61; *R. v. Voke*, R. & R. C. C. 531; *R. v. Clewes*, 4 C. & P. 221; E. C. L. R. 19; *R. v. Donnell*, 2 C. & K. 308; E. C. L. R. 61; *R. v. Tawell*, *ib.* 309.

^x *Penn v. Ward*, 2 C. M. & R. 338.

reasonable inference can be drawn, are inadmissible, since they are at best useless, and may be mischievous, because they tend to distract the attention of the jury, and frequently to prejudice and mislead them;⁷ yet on the other hand all facts and circumstances are admissible in evidence which are in their nature capable of affording a reasonable presumption or inference as to the disputed fact. It is the province of the judge,⁸ in the exercise of a sound discretion, to discriminate between such facts as are connected with the issue, and such as are merely collateral.

Frequently, however, it is difficult to ascertain *à priori*, whether proof of a particular fact offered in evidence will or will not become material, and in such cases it is usual in practice for the court to give credit to the assertion of the counsel who tenders such evidence, that the fact will turn out to be material.⁹

The following are instances where the question has been discussed whether the facts were sufficient to afford any inference as to the matter in dispute, and on that account admissible in evidence, and they will furnish the best illustration of the principle.

Thus the time at which one tenant pays his rent is not evidence to show at what time another tenant of the same landlord and of the same description as the former pays his rent.^b Nor is the quality of a commodity sold to one customer proved by showing the quality of that sold to others.^c Nor is the fact that
 *619] many tradesmen have treated the defendant as a *feme sole* evidence that she represented herself to the plaintiff as such.^d In trover, by assignees, against a creditor for goods alleged to have been delivered to him by the bankrupt by way of fraudulent preference, the fact that other creditors had delivered up goods received by them from the bankrupt before the fiat, was held not to be evidence for the plaintiffs.^e

A custom in one parish, archdeaconry, or manor, is no evidence

⁷ Nothing is inadmissible which is material to the issue joined, to prove or disprove it; *per* Blackstone, J., *Sayre v. Earl of Rochford*, Bl. 1169. No new matter foreign to the issue joined is admissible in evidence; *per* De Grey, J., Bl. 1165.

⁸ *Lewis v. Marshall*, 7 M. & G. 743; E. C. L. R. 49.

⁹ And see *Haigh v. Belcher*, 7 C. & P. 389; E. C. L. R. 32.

^b *Carter v. Pryke*, Peake, C. 95.

^c *Holcombe v. Hewson*, 2 Camp. 391.

^d *Barden De Keverberg*, 2 M. & W. 61; *Smith v. Wilkins*, 6 C. & P. 180; E. C. L. R. 25; *Delamotte v. Lane*, 9 C. & P. 261; E. C. L. R. 38.

^e *Backhouse v. Jones*, 6 Bing. N. C. 65; E. C. L. R. 37.

of the same custom in another.^f For in these and other such cases there is no such connection between the fact and the issue as to afford a reasonable inference from the one to the other. Where, on the other hand, such facts are by any general link connected with the issue, they become evidence. Thus, where all the manors within a particular district are held under the same tenure, and the issue is upon some incident to that tenure, the custom of one manor is evidence to prove that the same custom exists in another.^g And for a similar reason, on a question whether the Crown in right of the Duchy of Lancaster had the right to appoint a coroner for the honour *of Pontefract, part of that Duchy, evidence of the Crown having appointed coroners in other parts of the [620 Duchy, was held admissible.^h

So, where the issue is as to a particular right upon a common, evidence is inadmissible of the existence of such right on an adjoining piece of common, but if a connection between them be proved, and the right be claimed on both,ⁱ it becomes relevant and admissible.

Thus, where the question was, whether a slip of waste land between old inclosures and the highway belonged to the lord of the manor or to the owner of the adjoining inclosure, it was held that the lord might give evidence of grants by him of parts of the waste between the same highway and the inclosures of other persons at a considerable distance, the continuity of the waste between these spots and the one in question being broken for the space of sixty or seventy yards only by some old houses and a bridge.^k For a similar reason, where a belt of wood surrounded the plain-

^f *Furneaux v. Hutchins*, Cowp. 807; *Ruding v. Newell*, Str. 957, 601 662; Fort. 41; *Doe v. Sisson*, 12 East, 62; *Marquis of Anglesea v. Hatherton*, 10 M. & W. 218. And this rule applies although one manor be held of another; *Ibid.* But not apparently if one be a subinfeudation from the other; *Brisco v. Lomax*, 8 A. & E. 198; E. C. L. R. 35; *Duke of Somerset v. France*, *infra*; *Tyrwhitt v. Wynne*, 2 B. & Ald. 554. Unless the custom be general.

^g *Champion v. Atkinson*, 3 Keb. 90; *Duke of Somerset v. France*, Str. 652; Fort. 41, 44; *Anglesea v. Hatherton*, *supra*. The tenant-right which prevails through the manors upon the border between England and Scotland, and the particular customs which prevail in the mining districts of Derbyshire and Cornwall are of this kind; *Ibid.* So the same rule applies to the free conventional tenants in the assessional manors in the Duchy of Cornwall; *Rowe v. Brenton*, 8 B. & C. 758; E. C. L. R. 15. Although these are not manorial customs.

^h *Jewison v. Dyson*, 9 M. & W. 540.

ⁱ *Morewood v. Wood*, 4 T. R. 157; *Peardon v. Underhill*, 20 L. J., Q. B. 133.

^k *Doe dem. Barrett v. Kemp*, 2 Bing. N. C. 102; E. C. L. R. 29; in Cam. Scacc.

tiff's land but was undivided from the closes adjoining, evidence that the plaintiff had cut down timber therein, but the owners of the adjoining closes had not, was held admissible to prove that the belt belonged to the plaintiff.¹ Where the dispute was as to the ownership of part of the bed of a stream flowing between the plaintiff's farm and the defendant's, and the plaintiff claimed the whole bed of the stream adjacent to his land, evidence of acts of ownership exercised by the plaintiff over the bed of the river lower down the stream than the defendant's land and opposite another farm belonging to a third person was admitted.^m And the rule is the same as to evidence of acts of ownership, whether they are in *621] *the surface or in a mine under ground.ⁿ On a question as to the boundary between the Rochdale and Wakefield manors, it was admitted that it was identical with that between Lancashire and Yorkshire, and that it had always been understood to run over a mountain district, nearly north and south. The plaintiff proved that Rishworth manor had anciently been part of Wakefield, and that the boundary between Rishworth and Rochdale was identical with the boundary between Yorkshire and Lancashire. He was admitted to prove that the boundary between Rishworth and Rochdale had always been understood to be the highest part of a ridge of hills parting the waters which descended to the east and west.^o So, where a parish consists of several townships, evidence that all the townships but one had been accustomed to repair their highways (no parish surveyor being appointed,) is evidence that that one is bound to repair its own highways.^p

To prove the manner of carrying on trade at one place, evidence may be given of the manner in which the same branch of trade is carried on at another place.^q

Where the question is one of skill and judgment, evidence may be given of other facts, which, although in other respects collateral, are, by means of the skill and judgment of the witness, connected with, and tend to elucidate the issue.^r

¹ *Stanley v. White*, 14 East, 331. ^m *Jones v. Williams*, 2 M. & W. 326.

ⁿ *Taylor v. Parry*, 1 M. & G. 604; E. C. L. R. 39.

^o *Brisco v. Lomax*, 8 A & E. 198; E. C. L. R. 35.

^p *R. v. Barnoldswick*, 4 Q. B. 499; E. C. L. R. 45.

^q *Noble v. Kennoway*, Doug. 510; see *Milward v. Hibbert*, 3 Q. B. 120; E. C. L. R. 43.

^r *The Wells Harbour case*, M. 23 Geo. III.

So evidence of character is in many instances admissible.* So collateral facts are admissible to prove malice, intention, or guilty knowledge.†

In an action for a malicious prosecution, a publication [*622] by the defendant of an advertisement of the finding of the indictment and other matter on the subject of the prosecution, is evidence to prove the malice.‡ So, although acts done subsequent to a contract cannot alter the nature of the contract, they may be adduced to show what the contract was, if it be doubtful;§ therefore, an admission of a debt by the acceptance of bills of exchange by partners, in payment of goods sold, is evidence to show the fact of a sale to the partners.¶ In trover by assignees of a bankrupt, where the defendant claimed the goods under a bill of sale from *C.*, who claimed by assignment from *B.*, and *B.* by assignment from the bankrupt, and the plaintiffs asserted that all these transactions were fictitious, the fact of *C.* having made a claim to the goods

* See tit. CHARACTER.

† Thus on a charge of knowingly uttering a forged note or counterfeit coin, the possession or uttering of other forged notes, though of a different description, and other counterfeit coin (*Ball's case*, 1 Camp. 324; *Wylie's case*, 1 N. R. 92; *Mil-lard's case*, R. & R. 245; *R. v. Balls*, 7 C. & P. 426; E. C. L. R. 32), is admissible to prove the guilty knowledge. So on a charge of receiving stolen goods, the receipt by the prisoner at different times of several articles stolen from the prosecutor was admitted to prove guilty knowledge; *Dunn's case*, 1 Mood. C. C. 150. But the possession of other goods of the same sort as those stolen, belonging to a third person from whom they had been stolen, cannot be given in evidence on an indictment for receiving the prosecutor's goods knowing them to have been stolen; *The Queen v. Oddy*, 20 L. J., M. C. 198. See tit. FORGERY—COIN.

‡ *Chambers v. Robinson*, Str. 691. So, his misconduct towards a person prosecuted jointly with the plaintiff; *Caddy v. Barlow*, 1 M. & R. 275; E. C. L. R. 17. So, endeavouring to stop a witness by indicting him for perjury may be such evidence; *Haddrick v. Heslop*, 12 Q. B. 267; E. C. L. R. 64; *Rowlands v. Samuel*, 11 Q. B. 40, n; E. C. L. R. 63. A witness who preferred the indictment may be asked whether the defendant desired him not to prosecute, although he cannot be asked generally what the defendant said to him; *Osterman v. Bateman*, 2 C. & K. 728; E. C. L. R. 61.

§ *Saville v. Robertson*, 4 T. R. 720. In an action for making and fixing iron railing to houses belonging to the defendant, the defence was, that the credit was given to one *Amos*, who built the houses under a contract with the defendant. *Amos* having stated that the order was given by him, it was held that he might be asked how the balance of the account was between him and the defendant, including the charge he had against him for the iron railings and other parts of the building; *Gerish v. Chartier*, 1 C. B. 13; E. C. L. R. 50.

¶ 4 T. R. 720, *supra*.

*623] after the *bankruptcy, was held admissible in proof of that assertion.^z So, where the meaning of the terms of an agreement is doubtful, and depends on custom or usage, collateral evidence is admissible to explain them.^a

In order to prove that the acceptor of a bill of exchange knew the payee to be a fictitious person, evidence is admissible to show that the acceptor had accepted similar bills before they could, according to their date, have arrived from the place of date.^b And similar evidence is admissible to prove that the indorsee had a general authority from the acceptor to fill up bills with the name of a fictitious payee.^c

But where the defence of the acceptor to an action by the indorsee was that the acceptance was a forgery, evidence that a collection of bills in which the defendant's acceptance was forged had been in the plaintiff's possession and some of them circulated by him, but there was no proof that the bill in question was part of that collection, the evidence was rejected, as it clearly would have been on an indictment for forgery.^d

A collateral fact is not, in general, evidence to discredit a witness.^e But where a witness swore that a party had acknowledged two instruments to have been made by him, evidence was admitted that one of them was forged.^f

So, collateral evidence is admissible to show the probability of a surrender by a tenant for life, where the possession has long accompanied the recovery.^g

*624] ^hAs the main object of pleadings between the parties is to define and ascertain the questions in controversy, and to apprise the adversary of the nature of the evidence to be adduced against him, and which he will have to meet, it is essential to the purposes of substantial justice that these allegations should be

^z *Ford v. Elliott*, 4 Ex. 78.

^a See tit. PAROL EVIDENCE.

^b *Gibson v. Hunter*, 2 H. B. 288. So one felony may be evidence on an indictment for another, as uttering other forged notes, administering poison on another occasion, having previously fired another rick, &c.; *R. v. Dossett*, 2 C. K. 308; E. C. L. R. 61. So, if several distinct felonies be so connected together as to form part of one transaction, they may all be evidence on a charge of committing one of them; *R. v. Ellis*, 6 B. & C. 145; E. C. L. R. 13; *R. v. Long*, 6 C. & P. 179; E. C. L. R. 25; *R. v. Wylie*, 1 N. R. 94.

^c *Gibson v. Hunter*, *supra*.

^d *Griffiths v. Payne*, 11 A. & E. 131; E. C. L. R. 39.

^e See *ante*, pp. 237, 240; and *R. v. Watson*, 2 Starkie, C. 149; E. C. L. R. 3.

^f Ann. 311.

^g See 2 Saund. 175, *d*, n. (a).

established by corresponding proof. In general, therefore, every material and essential allegation in the *charge or the defence*, and every circumstance descriptive of any thing so alleged, must if disputed be proved in substance as averred.

The same reasons which require the cause of action, or of criminal charge, to be stated upon the record, require also that the allegations shall be proved: mere assertion without corresponding proof would be nugatory. And as such allegations and proofs are to answer certain legal purposes, it necessarily follows that it is always for the court to pronounce whether the facts proved satisfy the allegations on the record.

As questions of variance are of daily occurrence, it may not be improper here, before the decisions on the subject are noticed, to enter into a brief consideration of the principles upon which the doctrine is founded. With respect to the proof of the facts and circumstances alleged, three predicaments may occur: they are either all proved as alleged; or none of them are proved; or part are proved wholly or partially, and the rest are either not proved, or absolutely disproved or negatived. The last of these predicaments is of course the only one which can afford ground for discussion.

Now, considering that all human affairs and dealings are connected together by innumerable links and circumstances, forming one vast context, without any chasm or interruption, and undistinguished by the artificial boundaries and definitions of right and wrong prescribed by the law, it is in the nature of things impossible, that a transaction detailed upon the record can be identical with the one proved, if the proof vary in the slightest particular, be it in its own nature ever so insignificant.

*An act done at one day or place cannot be the same with an act done on another day, or at a different place; a robbery, where ten sovereigns were stolen, cannot be the same with a robbery where nine only were taken. It is easy, therefore, to see that to require this, as it were, *natural and absolute* identity of the allegations and proofs would be, at the least, highly inconvenient, if not wholly impracticable. Hence it is, that an artificial and *legal identity*, as contradistinguished from a *natural identity*, must be resorted to as the proper test of variance; that is, it is sufficient if the proofs correspond with the allegations, in respect of those facts and circumstances which are, *in point of law*, essential to the charge or claim. The rules which govern the connection between the alle-

gations and evidence must obviously result immediately from the principles which regulate the allegations themselves.

By the rules of law, specific remedies or punishments are annexed as incidents to certain defined combinations of circumstances. And, in order to the practicable application of such remedial and prohibitory definitions, it is necessary that the facts and circumstances of each individual case, corresponding with the legal definition, but amplified and particularized according to certain technical legal rules, should be detailed upon the record. And this principally with a view to the following objects: *first*, to apprise the defendant of the specific nature of the claim or charge which is made against him; *secondly*, to enable the court to adjudge whether the circumstances stated fall within any remedial or prohibitory law, and to pronounce the proper judgment if the facts alleged be established; and *thirdly*, to enable the parties to avail themselves of the verdict and judgment, should the same rights or liabilities be again discussed. When, therefore, in addition to the facts which are essential to the claim or charge, others are alleged which are wholly redundant and useless, the legal maxim applies, "*Utile per inutile non vitiatur*;" and as the law did not require the superfluous *circumstances to be
*626] alleged, so, although they have been improvidently stated, the law in furtherance of its object rejects them as mere surplusage, and no more regards them for the purposes of proof than if they had not been alleged at all.

It would be nugatory to require proof of allegations which are wholly impertinent; the identity of those allegations which are essential to the claim or charge, with the proofs, is all that is material. Therefore it is a general rule that whenever an averment may be *wholly rejected*, without prejudice to the charge or claim, proof is unnecessary.^h

Thus, if it were alleged that *A.*, being armed with a bludgeon and disguised with a visor, feloniously stole, took, and carried away the watch of *B.*, that *A.* was armed and disguised, being altogether foreign to a charge of larceny, would be rejected, and would require no proof on the trial.ⁱ

^h See the observations of Lawrence, J., in *Williamson v. Allison*, 2 East, 452, and of Lord Tenterden, C. J., 3 B. & C. 122; E. C. L. R. 10. And see instances of this rule, *Vowles v. Miller*, 3 Taunt. 137; *Bromfield v. Jones*, 4 B. & C. 380; E. C. L. R. 10; *Tanner v. Bean*, 4 B. & C. 312; E. C. L. R. 10; *Draper v. Garratt*, 2 B. & C. 2; E. C. L. R. 9; *Lord Churchill v. Hunt*, 2 B. & Ald. 685.

ⁱ *I. e.* on an indictment for larceny. So where an indictment for robbery alleged

The same principle extends much further: it frequently happens that the evidence fails to prove circumstances not altogether impertinent, but which are either merely cumulative or only affect the *magnitude* or *extent*^k of the claim or charge; and here, although circumstances are *alleged, which, if proved, would have been of legal importance, yet, although the evidence fail to establish the whole of what is alleged, the principle adverted to still operates to give effect to what is proved to the *extent* to which it is proved. The principles which require the cause of action or ground of offence to be stated, are satisfied: the adversary is not taken by surprise, for no fact is admitted in evidence which is not alleged against him; and the court is enabled to pronounce on the legal effect of the part which is established as true by the verdict of the jury, and the record shows the real nature and extent of the right or liability established. [*627]

Thus, if an indictment or declaration charge a defendant with having composed, printed and published a libel, he may be found guilty of the printing and publishing only.¹ So, if *A.* be charged with feloniously killing *B.* of malice prepence, and all but the fact of malice prepence be proved, *A.* may clearly be convicted of manslaughter, for the indictment contains all the allegations essential to that charge; *A.* is fully apprised of the nature of it, the verdict enables the court to pronounce the proper judgment, and *A.* may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts.

The same principle applies to allegations of number, quantity,

it to have been committed in the dwelling house of *A. B.*, a variance in the name of the owner was held wholly immaterial, for it was not essential to the crime of robbery that it should be committed in a dwelling house; *Pye's case*, East, P. C. 785; *Johnstone's case*, *ibid.* 786. So if arson be alleged to have been committed in the night; *Muston's case*, East, P. C. 1021.

^k Thus averments, which are only material by way of aggravation either of damages or the charge, if not proved, may be rejected; *Pallant v. Roll*, Bl. 900; *Mackally's case*, 9 Co. 61; *Combe v. Pitt*, 3 Burr. 1586.

¹ *R. v. Williams*, 2 Camp. 507; *R. v. Hunt*, *ibid.* 583. So, in an action for words, it suffices to prove so much of the words in any one count as are actionable; *Compagnon v. Martin*, W. Bl. 790. So it is sufficient to prove part of the false pretences alleged in an indictment for obtaining money by those means; *Rex v. Hill*, Russ. & R. C. C. 190. So if a plaintiff prove part of his breach of covenant; *Barnard v. Dutty*, 5 Taunt. 27; E. C. L. R. 1; or promise; *Gardiner v. Crosedale*, W. Bl. 198. And see further instances, *R. v. Sutton*, 4 M. & S. 532; *Combe v. Pitt*, 3 Burr. 1586; *Smith v. Hixon*, Str. 977; *Roberts et ux. v. Herbert*, 1 Sid. 5; *Spilsbury v. Micklethwaite*, 1 Taunt. 146.

*628] and magnitude,^m where the proof, *pro tanto* *supports the claim or charge. If a man be charged with stealing ten sovereigns, he may be convicted of stealing five; for when it is proved that he stole five, and the precise sum, quantity, or magnitude alleged is not put in issue by the nature of the claim or charge,ⁿ evidence is not admitted of a different offence from that charged, but of the same in legal essence, differing only in quantity, and constituting, therefore, a *natural*, but no *legal* variance; no evidence is received which is not warranted by the allegation, and the party may afterwards plead his conviction or acquittal notwithstanding the variance as to number.

But the doctrine as to the sufficiency of partial proof assumes that the evidence, so far as it extends, agrees with the allegations legally essential to the charge or claim; that is, that what is proved is part of what is alleged, and differs only in quantity or extent. Where an allegation is rejected *in toto*, it is assumed that the allegations are divisible, and that the averment in question may be so rejected without destroying the *legal identity* of the charge or claim.

It is a most general rule that no allegation which is *descriptive* of the *identity* of that which is legally essential to the claim or charge can ever be rejected. Were it otherwise, and if proof could be admitted which varied from the record, in consequence of the omission to prove any allegation descriptive of an essential particular, it is plain that the proof would no longer agree with the cause of action, or charge alleged, to *any extent*: they would differ throughout *629] in respect of that descriptive allegation; *and as the proof would be more general than the allegations, it would no longer be partial proof of the same charge or claim, but of a different and more general one. As an absolute and *natural* identity of the claim or charge alleged, with that proved, consists in the agreement between them in *all* particulars, so their *legal* identity consists in their agreement in all the particulars *legally* essential to support the charge or claim; and the identity of those particulars depends

^m Thus, in an action for waste, or cutting down trees, it is sufficient to prove that the defendant cut down part of the number alleged; 2 Rol. Abr. 706; Hob. 53. So, in *ejectione firmæ* for a fourth part of an estate, the plaintiff may recover a third of a fourth; 1 Sid. 239; *Denn v. Purvis*, 1 Burr. 327; *Gwinnet v. Phillips*, 3 T. R. 643; *Harrison v. Barnby*, 5 T. R. 248; *Forty v. Imber*, 6 East, 434; *R. v. Gilham*, 6 T. R. 265; *Powell v. Farmer*, Peake, C. 57; *Doe v. Jackson*, Dougl. 175.

ⁿ *Grant v. Astle*, Dougl. 722, note; *Gilbert v. Stanislaus*, 3 Price, 54; *Hare v. Cator*, Cowp. 766.

wholly on the proof of the allegations and circumstances by which they are ascertained, limited, and described. To reject any allegation *descriptive* of that which is essential to the charge or claim would obviously tend to mislead the adversary. The court, in giving judgment on a general verdict, could never be sure that those facts had been proved which were essential to support their judgment; and the record would afford but very uncertain evidence as to identity, should the same matter be again litigated. It is otherwise where the subject-matter is identified and ascertained independently of the additional description, or where the additional description is not essential to the identity of the subject-matter described; as if it were alleged that *C. D.* robbed or assaulted *A. B.*, wearing a black coat.*

It seems, indeed, to be an universal rule, that a plaintiff or prosecutor shall in no case be allowed to transgress those limits which, in point of description, limitation, and extent, he has prescribed for himself; he selects his own terms, in order to express the nature and extent of his charge or claim; he cannot, therefore, justly complain that he is limited by them; to allow him to exceed them *would, for the reasons adverted to, be productive of the [630
greatest inconvenience.

As no allegation, therefore, which is *descriptive* of any fact or matter which is *legally essential* to the claim or charge can be rejected altogether, inasmuch as the variance destroys the *legal identity* of the claim or charge alleged with that which is proved; upon the same principle, no allegation can be proved partially in respect of extent or magnitude, where the *precise extent or magnitude* is in its nature descriptive of the charge or claim.

If, in an action or indictment for a nuisance, the wrong be alleged to have been continued for twelve months, and proof be given that it has been continued for one month only, the variance would be immaterial, except so far as regarded the damages or punishment; for the injury or offence would in point of law be the same, whether continued for one month or for twelve; the only difference would be in point of duration.

* See *Draper v. Garratt*, 2 B. & C. 2; E. C. L. R. 9; *Stoddart v. Palmer*, 3 B. & C. 2; E. C. L. R. 10. Thus, where a justification in trespass alleged that the plaintiff was fighting with another person, being a passenger with the plaintiff on board a vessel of which the defendant was captain; and that the trespass was committed by the defendant as captain in preserving the peace, it was held unnecessary to prove such other person to have been a passenger; *Noden v. Johnson*, 20 L. J., Q. B. 95.

But if a contract were to be alleged to serve for twelve months for the sum of £12, and proof were to be given of a contract to serve for one month for the sum of £1, the variance would be material; the precise time, as well as the precise sum, being essential to the contract, and descriptive of the ground of claim. For although a nuisance continued for twelve months be an offence made up of the continuance for each of the several months which make up the twelve; a contract to serve for twelve months for £12 is not made up of twelve contracts to serve for a month for £1 each month, but each is separate and distinct in point of law.

The same observations apply to prescriptions, and all other cases where precise quantities, sums, duration or extent, are in point of law essential to the identity of an entire subject-matter, and descriptive of it.^p

*631] *Again, as the description of facts upon the record must necessarily be finite and limited, whilst the detail of those facts in evidence must usually be attended with a multitude of particular circumstances connected with them, it is perfectly clear that whatever minuteness of description may be requisite in stating the claim or charge upon the record, the evidence to prove those allegations must usually be still more particular and circumstantial, and consequently that the proof of more particulars than are alleged can never be material, provided such additional particulars consist with those which are alleged. The generality of the allegations may indeed constitute a vice in the record itself; but it never gives rise to the objection of variance from the evidence, unless the subject be of so entire a nature that the matter proved, but not alleged, is inconsistent with that which is alleged, and disproves it altogether.

If a man were charged with stealing a horse, the property of *John Doe*, generally, it would be no objection that on the evidence it appeared that there were two persons of that name, the elder and the younger; for if he stole the horse of either, the allegation

^p The question whether an averment is to be considered as descriptive, and therefore material, depends principally upon *the nature of the averment itself*, and the subject matter to which it is applied. But, 2ndly, in many instances the law pronounces averments to be merely formal, which would otherwise, according to the ordinary rule, be deemed descriptive. 3rdly, in other instances again, the question depends upon the *particular and technical* mode in which the averment is framed. As these three classes obviously depend upon the form of the averment, for the reason presently mentioned, instances of them will be reserved for Vol. III tit. VARIANCE.

would be true. But if he were to be charged with stealing the horse of *John Doe*, and it turned out that the horse was the property of *John Doe* and *James Doe*, the variance might be material; for the interest of *James Doe*, thus proved, but not alleged would show that the ownership was misdescribed altogether.

The general result of these principles and inferences seems to be, that in the case of *redundant allegations*, it is sufficient to prove *part* of what is alleged according to its **legal effect*, provided that [*632 that which is alleged, but not proved, be neither *essential* to the charge or claim,^a nor *describe or limit* that which is essential; and provided also, that the facts proved be alone sufficient in law to support the charge or claim. And that *redundancy of proof* will not be material, unless that which is proved, but not alleged, *contradict or disprove* that which is alleged.

Numerous instances of the practical results of the rules which have been thus briefly stated are to be found in the books. These, of course, have been decided upon the application of them to the precise forms of the allegations contained in the pleadings. As these forms will, within a very short period, in all probability, undergo a most extensive change, it will be expedient to defer any detail of the cases to a future volume. Under the heads too of the various actions illustrations of these rules will be found, and were the cases to be detailed here, very great inconsistency might occur between the different portions of the work. Those cases, therefore, which may continue to serve any useful purpose will be collected and set forth hereafter.^b

It is almost unnecessary to remark, that the consequence of any variance which according to these rules was regarded as material, however slight it might be, was fatal; and hence arose a practice of setting forth any claim or defence in every possible form in different counts or pleas. The greatest injustice also constantly occurred, from mere literal variances in setting forth written documents upon the record. These too were fatal, for the court had no power of reconciling the record with the evidence. This [*633 *was the worst and most palpable class. But there were also cases in which it became evident upon the trial, that

^a *Per* Abbott, C. J., 3 B. & C. 122; E. C. L. R. 10: "It is a general rule that a variance between the allegation and proof will not defeat a party, unless it be in respect of matter which if pleaded would be material."

^b See the observations of Abbott, C. J., 2 B. & Ald. 363.

^c See Vol. III. tit. VARIANCE.

a real dispute existed between the parties requiring the decision of a court of law ; but the question evolved upon the pleadings differing in some particulars from that upon which the real dispute between the parties turned, the evidence although, perhaps decisive upon the latter question, would in all probability lead to a verdict upon the former, which would leave the real question untouched, while the parties were excluded from all further remedy. In this state of the facts and of the pleadings the parties might have been misled, or they might not. In the latter case, the simple and most obvious mode of correcting the evil, was to mould the question evolved upon the pleadings into that which expressed the dispute between the parties. With this view, and at the same time to preserve the identity of the proposition asserted on the pleadings with that proved by the evidence, the legislature has introduced a power of amending the record, so as to make it correspond with the proof at the trial.

This object was first attempted by Lord Tenterden, in the stat. 9 Geo. IV. c. 15, in cases of variance between writings offered in evidence and the record which they were offered to prove. That statute, after reciting the great expense, delay, and failure of justice, by reason of variances between writings produced in evidence and the recital thereof upon the record, in matters not material to the merits of the case, and that such record could not in any case be amended at the trial, and in some cases could not be amended at any time, enacted, "That it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at Nisi Prius, and any Court of Oyer and Terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before such judge or court in any civil
 *634] action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared ; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the *postea*, and returned, together with the record,

and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended accordingly."

The remedial power thus given to the judge in the cases of written evidence, to which alone it was applicable, was found to be so beneficial, that by the Act for the further amendment of the law, 3 & 4 Will. IV., c. 42, it was most materially extended. That statute recites, that "Whereas great expense is often incurred, and delay or failure of justice takes place at trials by reason of *variances* as to some particular or particulars between the proof and the record or setting forth on the record or document, on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record: and whereas it is expedient to allow such amendments as are hereinafter mentioned to be made in the cause," and therefore enacts, "that it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be *pending before any such court or judge in any civil [*635 action, or in any information in the nature of a *quo warranto* or proceedings on a mandamus, when any variance shall appear between the *proof* and the *recital* or setting forth on the record, writ, or document, on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge, *not material to the merits* of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars, in the judgment of such court or judge, *not material to the merits* of the case, but such as that the opposite party *may have been prejudiced* thereby in the conduct of his action, prosecution, or defence, then such court

or judge shall have power to cause the same to be amended, upon payment of costs to the other party. and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable, and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the *postea* or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, or other records of the court from which such record *636] or *writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had. Provided, that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground: and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet. And it is further enacted, that the said court or judge shall and may, if they or he think fit, in all cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and notwithstanding the finding on the issue joined, the said court or the court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

Under this statute the judge at Nisi Prius will amend any variance which does not really affect the matter in dispute, and which was not likely to mislead the opposite party.[†] Thus, for example, he will amend the statement of a promise in the declaration,

[†] *Hemming v. Parry*, 6 C. & P. 580; E. C. L. R. 25; *per* Alderson, B.

although it be not a promise expressly made, but merely the legal result of the facts there stated, if it be incorrectly drawn, by substituting the correct legal result of those facts." So he will *amend the statement of the nature of the promise from an [637 absolute to a collateral promise, as where it was alleged to be a promise to pay for goods to be supplied to a third person, and was in fact a promise to guaranty the payment of such goods, he will cause the term guaranty to be substituted for pay." But where the consideration alleged for a promise was that the plaintiff would make advances, the judge refused to substitute as the consideration that the plaintiff would procure a company so to do, although he was a partner in that company." Nor will he amend by introducing an entirely different contract,* as by substituting an agreement for a lease, wherein the breach should be having no title to grant it, for the statement of an actual demise whereby the plaintiff promised that the defendant should enjoy without eviction.†

By the stat. 14 & 15 Vict. c. 100, very similar powers of amendment are extended to criminal cases. That statute enacts,‡ "That whenever on the trial of any indictment for any felony or misdemeanour there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal which shall form the subject of any offence charged therein, or in the name or description of *any person or persons, body [638 politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the christian name or sur-

‡ *Whitwell v. Scheer*, 8 A. & E. 301; E. C. L. R. 35; *Smith v. Bradshaw*, 9 Dowl. 430.

† *Hanbury v. Ella*, 1 A. & E. 61; E. C. L. R. 28; and see *Guest v. Elwes*, 5 A. & E. 118; E. C. L. R. 31.

* *Boucher v. Murray*, 6 Q. & B. 362; E. C. L. R. 51.

† *Brashier v. Jackson*, 6 M. & W. 549.

‡ These instances will serve to illustrate the principle on which the courts have acted upon this statute; but for the reason above-mentioned, (p. 631, note,) such of the other decisions as may hereafter be found useful will be collected in a future volume, under the head of VARIANCE.

* Upon this statute no decisions have yet been reported.

name, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any poperty named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be endorsed on the *postea*, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be endorsed on the indictment or shall be engrossed on parchment, and filed together with the indictment among the records of the court: provided, that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, *639] and of the defendant and *his surety or sureties, if any accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: Provided also, that where any such trial shall be to be had before another jury, the Crown and the defendant shall respectively be entitled to the same

challenges as they were respectively entitled to before the first jury was sworn.

In the next place, it is a rule that no evidence is necessary to prove any material allegation which is agreed upon by the pleadings, or document, on which the trial is had; for the jury are sworn to try the matter in issue between the parties, and no other question is before them.^a The party therefore who makes any material and traversable allegation,^b which his antagonist does not *traverse, is not required to sustain it by any proof; and, [640 for the same reason, evidence to disprove it is not admissible.^c Thus, if the defendant in replevin avow the taking the cattle damage-feasant in the *locus in quo*, as parcel of the manor of *K.*, and the plaintiff make title to the manor of *K.*, and traverse that the manor is the freehold of the defendant, the plaintiff cannot prove that *K.* is no manor, for that is admitted by the traverse.^d

^a B. N. P. 298; *Wimbish v. Tailbois*, Plowd. 48; *Dunford v. Trattles*, 12 M. & W. 259. Of course the admission does not extend beyond what is alleged on the record; *Williams v. Sils*, 2 Camp. 519. Where the defendant pleaded, to an action of trespass, a custom applicable to all farms in the parish not excepted by special agreement, which custom the plaintiff traversed, he was not allowed under this issue to prove that his farm (the *locus in quo*) was excepted by special agreement; *Evans v. Ogilvie*, 2 Y. & J. 79. But a matter is not admitted which is impliedly, although not expressly, traversed; *Dunstan v. Tresider*, 5 T. R. 2.

^b *Couling v. Cox*, 6 C. B. 703; E. C. L. R. 60; *King v. Norman*, 4 C. B. 884; E. C. L. R. 56; *Bennion v. Davison*, 3 M. & W. 179; *Grew v. Hill*, 3 Ex. 801; *Gale v. Lewis*, 9 Q. B. 730; E. C. L. R. 58. In trespass for entering the plaintiff's house and taking his goods, the defendant pleaded a justification under a writ of execution against the goods of *A. B.*, and a warrant thereunder delivered to the defendant, a bailiff, to be executed; under which he entered and seized the plaintiff's goods. The plaintiff replied, admitting the writ, warrant, and delivery thereof to the defendant, but traversing the rest of the plea. It was held that the defendant was not bound to prove the warrant: *Hewitt v. Macquire*, 21 L. J., Ex. 90.

^c *Bonzi v. Steward*, 4 M. & G. 295; E. C. L. R. 43; *Needham v. Fraser*, 1 C. B. 815; E. C. L. R. 50; *Pegg v. Stead*, 9 C. & P. 636; E. C. L. R. 38; *Guy v. Gregory*, 9 C. & P. 584; E. C. L. R. 38; *Gwynne v. Sharpe*, Car. & M. 532; E. C. L. R. 41.

^d *Guy v. Gregory*, *supra*; see tit. WAY. The question whether a seizure was under the writ or not is left open; *Carnaby v. Welby*, 8 A. & E. 872; E. C. L. R. 35. So, in *Colishaw v. Cheslyn*, 1 C. & J. 48, where it was averred that one was seised in fee, and being so seised granted; a traverse of the grant admits the seisen in fee. And where a pleading stated that a corporation was seised in fee, and being so seised by indenture demised to *H.* for lives, and delivered seisen to him, who thereby became and was seised, and being so seised granted a right of

And the jury cannot find against the admissions of the parties on the record, though they be contrary to the truth; but in other cases, as has been seen,^e the jury are not estopped to find the truth, though the parties are. But where there are several issues joined,^f *an admission involved in one does not operate as an admission in relation to any other. Nor are the statements of a party in a declaration or plea, though for the purposes of the issue he is bound by those which are material, and the evidence must be confined to them upon an issue, to be treated (it would seem) as confessions of the truth of the facts stated.^g

way over the *locus in quo*, and the grant of the right of way is traversed. By this traverse all the previous steps of the derivative title are admitted; *Cooke v. Blake*, 1 Ex. 220. Where a plea justified an imprisonment, under an order of the Judge of the Sheriff's Court of London, for non-payment of money recovered there, and set forth various proceedings in the cause necessary to give jurisdiction, and stated that the Judge duly made the order, which last averment was traversed; it was held that the proceedings set forth were not included in the last averment, but were admitted; *Buchanan v. Kinning*, 20 L. J., C. P. 252, in Cam. Scacc. So, in an action on a bond, with a plea that there was a usurious agreement between the parties, and that the bond was given in pursuance of it, a denial of the latter allegation admits the former; *Carter v. James*, 13 M. & W. 137.

^e *Supra*; and see B. N. P. 298; *Goddard's case*, 2 Co. 4.

^f *E. g.* A plea of set-off is not evidence of the debt sued for and denied in another plea. The same rule applies to a particular set-off, it being virtually part of the plea; *Burkitt v. Blanshard*, 3 Ex. 89; *Harrington v. Macmorris*, 6 Taunt. 228; E. C. L. R. 1; Willes, 380; *Stracy v. Blake*, 1 M. & W. 168; *Gould v. Oliver*, 2 M. & G. 208; E. C. L. R. 40. In an action of replevin, the defendant avowed upon a distress for rent arrear, to which the plaintiff pleaded: first, that he tendered the rent; and secondly, that he did not hold under the defendant. It was held that the plea of tender and evidence thereof were not together evidence of the holding as traversed by the second plea; *Knight v. McDouell*, 12 A. & E. 438; E. C. L. R. 40.

^g *Boileau v. Rutlin*, 2 Ex. 681.

It is clear from all the cases just quoted, that the Judge is bound to tell the jury what is admitted by the pleadings; but a question has occurred whether what is so admitted is evidence upon the issue joined, so as to warrant the jury in drawing any inference from it as to that issue. This has given rise to much discussion, and it may be that if a party wishes the jury to draw any inference he must establish the facts from which that is to be drawn by evidence, according to which they are sworn to find their verdict. See the cases, *ante*, p. 592, note (t); and *Robins v. Lord Maidstone*, 4 Q. B. 811; E. C. L. R. 45. For, as Cresswell, J., observes, in *Fearn v. Filica*, 7 M. & G. 573; E. C. L. R. 49; "If the rule be not that an admission on the record is not to be taken to prove the issue, this singular state of circumstances might arise: a counsel might ask a jury, from the mere state of the record, to infer a fact which was directly in issue." *Dunstan v. Tresider*, *ante*, p. 639.

Next, as to the *quality* of the evidence to be adduced by the parties.

It is the peculiar province of the jury to decide upon the force and effect of the evidence submitted to them; but, as has already been seen, the law, by many rules of a negative nature, excludes from their consideration some matters, on account of their general tendency to mislead and to create prejudice, rather than to promote the cause of truth. One of the most important rules upon this *subject is that which requires that the best *attainable* evidence shall be adduced to prove every disputed fact. This [*642 rule has already been adverted to, though but slightly, inasmuch as its effect is not to exclude any of the materials of evidence in the abstract, but only by comparison of the evidence offered with that which might have been produced, but which has been suspiciously withheld.

The ground of this rule^b is a suspicion of fraud. If it appear from the very nature of the transaction that other and better evidence of the fact is withheld, a presumption arises that the party has some secret and sinister motive for not producing the best and most satisfactory evidence, and is conscious that if the best were to be afforded, his object would be frustrated: subject, then, to the observations which will be made upon the operation of this rule, it follows, that of the several gradations in the scale of evidence, no evidence of an inferior class can be substituted for that of a superior degree. It is a very general rule, that the contents of a writing cannot be proved by a copy,¹ still less by mere oral evidence, if the writing itself be in existence and attainable.^k If a deed be lost, a copy has been held not to be evidence if a counterpart exist.¹ And, except on special grounds, no declaration* [*643 or entry by any person can be given in evidence, where the

^a B. N. P. 293-4; *supra*, p. 500.

^b *Supra*, pp. 499, 500. To prove an insurance from fire, the books of the company are not the best evidence. The policy itself must be produced; *R. v. Doran*, 1 Esp. C. 127; Kenyon, C. J., 1791.

^k *Supra*, p. 530. See the observations of Lord Tenterden, in the case of *Vincent v. Cole*, M. & M. 258; E. C. L. R. 22; as to the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; and see also *The Queen's case*, 2 B. & B. 287, *supra*; E. C. L. R. 6; *Crowley v. Page*, 7 C. & P. 790; E. C. L. R. 32; *Strother v. Barr*, 5 Bing. 151; E. C. L. R. 15; Vol. II. tit. ASSUMPSIT—EJECTMENT—TITLE OF LANDLORD.

¹ *Supra*, p. 542. But this seems very questionable; see *Doe v. Wainwright*, 5 Ad. & E. 523; E. C. L. R. 31. The commissioners under an Enclosure Act

party who made such declaration or entry can be produced and examined as a witness.^m These are well known definite gradations of evidence, to which the principles may be applied without much difficulty. Thus, upon a question, whether the Abbey de Sentibus was an inferior abbey or not, Dugdale's *Monasticon Anglicanum* was rejected, because the original records might be had at the Augmentation Office.ⁿ

This rule relates not to the measure and quantity of evidence, but to its *quality* when compared with some other evidence of superior degree. It is not necessary, in point of law, to give the fullest proof that every case may admit of. A will of lands may be proved by one witness only.^o If there be several eye-witnesses to a particular fact, it may be proved by the testimony of one only.

*Where the defendant, in order to disprove the right
*644] claimed by the plaintiff to erect certain hatches on a river, offered in evidence ancient articles of agreement between persons standing in the respective situations of the plaintiff and defendant; and the defendant's attorney produced the deed, and said he received it from the son of the owner of the defendant's land; and on the objection being taken that this was insufficient, the father was called, whose testimony was objected to on the score having made minutes of their proceedings; held, that parol evidence of the divisions and allotments was inadmissible, the minutes of the commissioners not being produced or accounted for; *Bendyshe v. Pearse*, 1 B. & B. 460; E. C. L. R. 5.

^m Even although the parties to be called would criminate themselves by the proof required; *Edmondstone v. Webb*, 3 Esp. C. 264; *The Queen's case*, 2 B. & B. 311; or be abroad, *ante*, p. 474; E. C. L. R. 6.

ⁿ Salk. 281. Oaths taken by a preacher under the Toleration Act are matter of record, and cannot be proved by parol evidence. *R. v. Hube and others*, Peake's C. 132. To prove that A. was chosen constable, the wardmote book, containing an account of the election, should be produced; a list from the town clerk's office of the persons sworn in to serve the office, in which the name of B. appears as having been sworn as substitute for A., is not the best evidence; *Underhill v. Wills*, 3 Esp. C. 56.

^o See tit. WILL; B. N. P. 264. So handwriting may be proved by another, without calling the writer; See *Hughes' case*, 2 East, P. C. 1002. *M'Guire's case*, *ib.*: for other illustrations, see *Liebman v. Pooley*, 1 Starkie's C. 167; E. C. L. R. 2; and tit. AGENT—PERJURY. Where consent is to be negatived, even in a criminal case, it is not absolutely necessary that the party himself whose consent is required to be negatived should be called. As upon indictments for unlawfully killing deer or taking fish; *Allen's case*, 1 Mood, C. C. 154, before the Judges; *Hazy's case*, 2 C. & P. 458; E. C. L. R. 12; overruling *R. v. Rogers*, 2 Camp. 654, in this respect. See *ante*, p. 594.

of interest; it was held that the deed was inadmissible, for the testimony of the father had been objected to, and the next best evidence had been given.^p

Nor does it apply in any case, unless the evidence proposed be in its general nature of an inferior degree to that for which it is sought to be substituted. It is not sufficient that it may probably be less satisfactory in the particular instance. Where a plaintiff proved notice to the defendant to produce a letter written by him to the defendant, it was held that the plaintiff was at liberty to prove the contents by any witness who knew them, and that he was not obliged to call the clerk who wrote the letter.^q

The rule assumes, that from the nature of the transaction superior evidence may be had; and therefore it never excludes evidence which is the best that can be then produced by the party.^r

^p *Carol v. Jeans, cor. Holroyd, J., Dorch. Sp. Ass. 1819, Manning's Ind. 375, 2nd edit.*

^q *Liebman v. Pooley, 1 Starkey's C. 167; E. C. L. R. 2.*

^r *Gilb. Ev. 3, 4; B. N. P. 294.* Where, on principles of public policy, a document cannot be read in evidence, the effect will be the same as if it was not in existence; *Cooke v. Maxwell, 2 Starkie's C. 483; E. C. L. R. 3.* Therefore, where such a document contains an order from a public officer, no evidence can be given of its contents, but it may be shown that what was done was done by the order of such officer; *Ibid.*

¹ Evidence of an inferior nature, which supposes evidence of a higher nature in existence cannot be received; *Taunton Turnpike v. Whiting, 10 Mass. 327; Commonwealth v. James, 1 Pick. 375; United States v. Gibert, 2 Sumner, 19; Mordecai v. Beal, 8 Porter, 529.*

A printed advertisement is not admissible where it is shown that it was copied from a manuscript, and the manuscript is not accounted for; *Sweigart v. Lowmartin, 14 Serg. & R. 200.*

As between living witnesses, one is not to be excluded because another had a better opportunity of knowing a fact deposed to; *The Governor v. Roberts, 2 Hawks, 26.*

The contents of letters which are lost may be shown by any one, without accounting for the non-production of the person to whom they were written; *Drish v. Davenport, 2 Stewart, 266.*

In a trial under an indictment for uttering a forged bank note, an officer of the bank ought to be examined; *The State v. Petty, Harper, 59.*

The writings of a living author on recent historical subjects are not admissible in evidence if the author himself is within reach of the process of the court; *Mowris v. Harmer, 7 Peters, 554.*

Parol evidence is not admissible if there be written evidence to the same point within the power of the party offering it; *Cloud v. Patterson, 1 Stewart, 394; McWilliams v. Willis, 1 Wash. 199; Sebree v. Dorr, 9 Wheat. 558; Davis v. Robertson, 1 Rep. Const. Ct. 71; De Tastet v. Croussillat, 2 Wash. C. C. 132;*

Hence if a deed or other written document be lost, or be in the hands of the adversary, who refuses to produce it,^a a copy of it is admissible. If a witness to a bond be dead, or be beyond seas, *645] *out of the jurisdiction of the court, it may be read upon proof of his handwriting.^b So where the witnesses are dead, their depositions or their declarations made when they were *in extremis* frequently become evidence. Where a prisoner's examination, taken in writing before the coroner, could not, in consequence of an irregularity in the latter, be read, it was held that the coroner might be asked as to what the prisoner said on that occasion.^c

Neither is the rule strictly adhered to where a mere negative is to be proved, especially where it results from inspecting documents of a voluminous nature.^d And though a witness cannot give evidence of accounts not produced, he may, it seems, be examined as to the general state of such accounts, or he may give evidence of the general course of trade, as that the practice has been to accept bills in a particular form, according to one invariable course of dealing.^e In *Rowe v. Brenton*,^f a witness was allowed to state the result of his examination of a number of old records, and to prove their correspondence with one which had been read. So a witness may be examined as to the general result of inquiries from accounts rendered by a bankrupt of his affairs as to his solvency at a particular time.^g And in general, where evidence is given as to

^a See WRITTEN INSTRUMENT, PROOF OF, *ante*, pp. 543, 568.

^b *Ante*, p. 312.

^c *R. v. Reed*, M. & M. 403; E. C. L. R. 22.

^d Where, in order to show the insolvent state of the party before bankruptcy, the assignees (plaintiffs) offered the ledger of the bankers of the bankrupt to prove that he had no funds in their hands; it was held, that it was properly received to prove the negative, without calling the different clerks who made the entries, although it might not be admissible to prove the affirmative; *Furness v. Cope*, 5 Bing. 114; E. C. L. R. 15.

^e *Roberts v. Doxon*, Peake's C. 83; *Spencer v. Billing*, 3 Camp. 310. But if the mode of dealing has varied, the bills must be produced.

^f 3 M. & R. 212.

^g *Assignees of Mayer v. Sefton*, 2 Stark. C. 274; E. C. L. R. 3. Lord Ken-

Buell v. Cook, 5 Conn. 206; *Rusk v. Sowerwine*, 3 Har. & Johns. 97; *Thornton v. Moody*, 2 Fairfield, 253.

Though a plaintiff goes through his proof without objection and rests his cause, if he has proved by parol a piece of written evidence; which ought to be produced, it is not too late for the defendant to object that the writing should be produced; *Southwick v. Hayden*, 7 Cowen, 334.

introductory or collateral matters, *which did not depend at all upon the particular form or contents of the instrument, such evidence, though perhaps not strictly warranted, is for convenience sake usually admitted in practice without objection. [*646]

Again, as the rule was intended to guard against fraud, its operation ceases where the presumption of fraud does not arise; consequently it does not apply where the law itself raises a presumption under particular circumstances. And, therefore, in general, in order to prove that a particular person was a magistrate or constable, it is sufficient to prove that he acted as such; for then, in the absence of evidence to the contrary, it is to be presumed that he was duly and legally appointed.^b The rule, as well as the principle, seems to extend to all public officers.^c It has been held to extend to persons acting as Lords of the Treasury;^d to one acting as a surrogate in the Ecclesiastical Court;^e to a public commissioner for taking affidavits;^f to a sheriff, undersheriff, or replevin clerk;^g to a Master in Chancery, acting under a special appointment from the Lord Chancellor to issue fiats in bankruptcy;^h to constables and watchmen acting under local commissions appointed by act of parliament;ⁱ to trustees under a turnpike act;^k to commissioners under a local act to raise a church rate;^l to churchwardens and *overseers;^m to an army surgeon;ⁿ so where the plaintiff proved his acting as vestry [*647]

yon had received similar evidence; see *Topham v. McGregor*, 1 C. & K. 320, ante, p. 176; E. C. L. R. 47.

^b See, per Buller, J., *Berryman v. Wise*, 4 T. R. 366; *Gordon's case*, 1 Leach, C. C. 515; per Parke, B., *McGahey v. Alston*, 2 M. & W. 208. So that a Justice was of the quorum from his having acted as such; *R v. Vickery*, 12 Q. B. 484; E. C. L. R. 64.

^c *McGahey v. Alston*, 2 M. & W. 209; *Cannel v. Curtis*, 2 Bing. N. C. 228; E. C. L. R. 29.

^d *R. v. Jones*, 2 Camp. 131.

^e *R. v. Verelst*, 3 Camp. 432; *R. v. Cresswell*, London Sitings after M. 1816; 1 Phill. on Ev. 9th edit. 433.

^f *R. v. Howard*, 1 M. & Rob. 187; *R. v. Newton*, 1 C. & K. 480; E. C. L. R. 47; *Bunbury v. Mathews*, *ibid.* 380.

^g *Doe v. Brawn*, 5 B. & Ald. 243; E. C. L. R. 7; *Plumer v. Brisco*, 11 Q. B. 46; E. C. L. R. 63.

^h *Marshall v. Lamb*, 5 Q. B. 115; E. C. L. R. 48.

ⁱ *Butler v. Ford*, 1 C. & M. 662.

^k *Pritchard v. Walker*, 3 C. & P. 212; E. C. L. R. 14.

^l *R. v. Murphy*, 8 C. & P. 310; E. C. L. R. 34.

^m *Does v. Barnes*, 8 Q. & B. 1037; E. C. L. R. 55.

Milbanke v. Grant, 3 Q. B. 690; E. C. L. R. 43.

clerk;° so in the case of a revenue officer.º The rule applies although the officer is himself suing or defending, and that too in respect of his being such officer.ª The rule does not extend to persons acting under private authority, as to a tithe collector.ª Nor to assignees of a bankrupt.ª

So where a document is of a public nature, a copy of it is evidence; for the production of the original is dispensed with on account of the inconvenience which would result from the frequent removal of public documents, and consequently the absence of the original affords no presumption of fraud; and the probability of fraud is much diminished by the consideration that it would be liable to easy detection by reference to so accessible an original.ª

*648] For *like reasons, inscriptions on tombstones, walls, and fixed tables, are usually proved by oral evidence.ª

The rule does not apply where the adversary has admitted the fact which is to be proved; for he is in general barred by his own admission or representation, and cannot complain that his own statement is believed.ª

It is likewise a general and most inflexible rule, that wherever

° *M Gahey v. Alston*, 2 M. & W. 211.

º See 26 Geo. III. c. 77, s. 13, and *ib.* c. 82, s. 6; 7 & 8 Geo. IV. c. 53, s. 17; 8 & 9 Vict. c. 87, s. 131; 8 & 9 Vict. c. 85, s. 7, and c. 93, s. 75; see tit. PRESUMPTIONS—OFFICER, *post*.

ª *M Gahey v. Alston*, *supra*, where he was nominal plaintiff; *Cannell v. Custis*, 2 Bing. N. C. 228; *E. C. L. R.* 29, where he sued for a libel on him in his character of overseer; *Doe v. Barnes*, *supra*, where churchwardens and overseers sought to recover a parish house; *Butler v. Ford*, *supra*, where constables were sued for an act done as such; and see *Gordon's case*, *supra*; *R. v. Borrett*, 6 C. & P. 124; *E. C. L. R.* 25; and *R. v. Rees*, 6 C. & P. 606; *E. C. L. R.* 25; where the prisoner was employed in the post-office, and was indicted for embezzling a letter while so employed. So *R. v. Townsend*, Car. & M. 178; *E. C. L. R.* 41. It seems questionable, where there is an issue upon the fact of the appointment to an office, whether that must not be regularly proved. Thus where the appointment of town clerk by a corporation was in issue, an appointment under seal was required; *R. v. Stamford*, 5 Q. B. 433; *E. C. L. R.* 51. So of the office of coal-meter; *Smith v. Cartwright*, 20 L. J., Ex. 401, in Cam. Scacc.; and see *Moises v. Thornton*, 8 T. R. 303; *Collins v. Carnegie*, 1 Ad. & E. 695; *E. C. L. R.* 28.

ª *Short v. Lee*, 2 J. & W. 468.

ª *Pasmore v. Bousfield*, 1 Stark. C. 296; *E. C. L. R.* 2.

ª *Supra*, tit. PUBLIC DOCUMENTS; *infra*, Vol. II. tit. CHARACTER.

ª *Doe v. Cole*, 6 C. & P. 360; *E. C. L. R.* 25; *R. v. Fursey*, 6 C. & P. 84; *E. C. L. R.* 25.

ª *Slatterlie v. Pooley*, 6 M. & W. 664; and *ante*, pp. 605, 506; see also Vol. II. tit. ADMISSION.

written instruments are appointed, either by the requirement of law or by the compact of parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy: of *principle*, because such instruments are in their own nature and origin entitled to a much higher degree of credit than parol evidence; of *policy*, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence.¹

The rule may be thus generally stated, *viz.*, that oral evidence shall in no case be received as *equivalent* to, or as a *substitute* for, a written instrument, where the latter is required by law,² or to give effect to a written instrument, which is *defective* in any particular which by law is essential to its validity;³ or to *contradict*, *alter*, or *vary*⁴ a written instrument, either appointed by law or by the compact of private parties, to be the appropriate memorial of the particular facts which it recites; for by doing so, oral testimony would be admitted in usurpation of a species of evidence decidedly superior in degree.

¹ *Infra*, p. 649.

² *Infra*, p. 560, *et seq.*

³ *Infra*, p. 655, *et seq.*

¹ Parol evidence is inadmissible to contradict, vary or alter a written contract; *Shankland v. Corporation of Washington*, 5 Peters, 390; *Perrine v. Cheeseman*, 6 Halst. 174; *Spencer v. Tilden*, 5 Cowen, 144; *United States v. Thompson*, 1 Gallison, 388; *Bowyer v. Martin*, 6 Rand. 525; *Jones v. Warner*, 11 Conn. 40; *Creery v. Holly*, 14 Wend. 26; *Singleton v. Fore*, 7 Mississippi, 515; *The State v. Stites*, 1 Green. 172; *Mead v. Steger*, 5 Porter, 498; *Hull v. Adams*, 1 Hill, 601; *Featherstone v. Wilson*, 4 Pike, 154; *Rice v. Woods*, 21 Pick. 30; *Cole v. Handley*, 8 Smedes & Marsh. 473; *Beckley v. Manson*, 22 Conn. 299.

A written instrument may be contradicted by the party making it, when offered in evidence in a suit to which a stranger to the instrument is a party; *Venable v. Thompson*, 11 Alabama, 147.

Parol evidence is admissible to show that a conveyance absolute on its face was in fact a mortgage; *Gilchrist v. Cunningham*, 8 Wend. 641; *Hayworth v. Worthington*, 5 Blackford, 361; *Swart v. Service*, 21 Wendell, 36; *Brainerd v. Brainerd*, 15 Conn. 575; *Bishop v. Bishop*, 14 Alabama, 475; *Babcock v. Wyman*, 19 Howard U. S. 289; *Royar v. Walker*, 1 Wisconsin, 527; *Hazard v. Loring*, 10 Cushing, 267.

Contra at law; *Hale v. Jewell*, 7 Greenl. 435; *Hogel v. Lindell*, 10 Missouri, 483; *Montang v. Rock*, *Ibid.* 506; *Cook v. Eaton*, 16 Barb. 439.

A resulting trust may be shown by parol; *Jackson v. Mills*, 13 Johns. 463; *Scoby v. Blanchard*, 3 N. Hamp. 170; *Boyd v. McLean*, 1 Johns. Ch. Rep. 582; *Andrews v. Jones*, 10 Alabama, 460.

But parol evidence is admissible to *defeat*^b a written instrument, on the ground of fraud, mistake, &c., or to *apply* it to its proper *649] subject-matter,^c or to *explain* the *meaning of foreign, local, or technical or family terms,^d or to *rebut* presumptions arising intrinsically. In these cases the parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate *at all*, or is essential in order to give to the instrument its legal effect.

The extent to which this principle operates, and the rules deducible from it, will be exhibited in the clearest point of view by reference to the different purposes for which parol testimony can be offered in relation to written instruments. Parol evidence, in general, may be offered for three purposes in relation to written evidence: *First*, in OPPOSITION to written evidence, where it is offered with a view to *supersede* the use of written evidence, and to supply its place, or to *contradict* it, or to *vary* its effect, or wholly to *subvert* such evidence, by showing that it has no legal existence, or no legal operation in the particular case;^e or *secondly*, it is offered in AID of written evidence, in order either to *establish* a particular document, or to *apply* it to its proper subject-matter, or to *explain* it, or to rebut some *presumption* which affects it, or as secondary evidence, where the original is unattainable;^f or *thirdly*, it is used as *original and INDEPENDENT* evidence to prove a particular fact, without regard to written evidence of the fact, not being excluded by any rule of law.^g

I. *In opposition to written evidence.*—in the first place, parol evidence is never admissible to *supersede* the use of written evidence, where written proof is required by the law.

Where the law, for reasons of policy, requires written evidence, to admit oral testimony in its place would be to subvert the rule itself. The same observations applies where the law prescribes a *650] certain form of written evidence; *to allow a defect in the instrument to be supplied by oral evidence, would be, *pro tanto*, to dispense with the law. Hence, in general, where the law requires a formal written instrument,^h if the document offered in evidence be *defective*, so that it cannot operate without collateral

^b *Infra*, p. 671, *et seq.*

^c *Infra*, p. 679.

^d *Infra*, p. 701, *et seq.*

^e *Infra*, p. 671.

^f *Supra*, pp. 543, 568.

^g *Infra*, p. 716, *et seq.*

^h See tit. STATUTE OF FRAUDS, *post*, Vol. II.

aid, the defect cannot be supplied by oral testimony. Thus, if in a will the name of the intended devisee or legatee be omitted, or a blank be left for the description of the estate, or amount of the legacy, these omissions cannot be supplied by oral testimony as to the real intention of the testator.¹ And although different writings may, by internal inference, be connected together so as to constitute one entire instrument within the Statute of Frauds, yet they cannot be connected by mere oral testimony,^k neither can any defect in the writing be supplied by oral evidence.¹

*In cases where a written document is not absolutely essential, in point of law, to give a legal operation to that [651 which is to be proved, as it is in cases under the Statutes of Frauds and of Wills, yet if there be a written memorial constituted, parol evidence cannot, in general, be substituted.^m The examination of

¹ *Baylis v. Attorney-General*, B. N. P. 298; 2 Atk. 240, S. C.; *Woollam v. Hearn*, 7 Ves. 211. Where the testatrix made a disposition in favour of Lady —, and the will contained other provisions in favour of Lady Hort, and she was appointed a trustee in the will by the name of Dame Hort, Lord Thurlow held that the blank could not be supplied by parol evidence; *Hunt v. Hort*, 3 Bro. C. C. 311. In *Abbot v. Massie*, (3 Ves. 148), where a legacy was given to Mrs. G—, Lord Loughborough referred it to the Master to ascertain who Mrs. G. was, who was there described by initial letter only. But see Sir D. Evans' observations upon this case in his edition of Pothier, vol. ii. p. 204. Where a blank was left for the Christian name, parol evidence was admitted to show who was intended; *Price v. Page*, 4 Ves. 680; but see *Doe v. Hiscocks*, *post*, p. 681.

^k *Boydell v. Drummond*, 11 East, 142; Vol. II. tit. STATUTE OF FRAUDS.

¹ *Ibid.* So an agreement, referring to such parts of another instrument as had been read by one party to another, is not sufficient within the statute, because it is imperfect without parol evidence; but an instrument which is conformable to the statute may by reference include the contents of another which is not so; *Brodie v. St. Paul*, 1 Ves. jun. 326; but see *Clayton v. Lord Nugent*, 13 M. & W. 200. Although parol evidence be not admissible to aid an imperfect instrument; *Halliley v. Nicholson*, 1 Price, 404; yet where a question arises, as to which an instrument is admissible but not decisive evidence, such parol evidence is admissible for the purpose of proving an independent fact which is explanatory of it; *R. v. Laindon*, 8 T. R. 397; *R. v. Billingham*, 5 Ad. & E. 676; E. C. L. R. 31; *R. v. Stoke-upon-Trent*, 5 Q. B. 308; E. C. L. R. 48; as that there was another consideration for the contract than the one stated in it; *R. v. Northwingfield*, 1 B. & Ad. 912; E. C. L. R. 20; or that the money paid on apprenticeship was parish money, and consequently that no stamp was required; *R. v. Llangunnor*, 2 B. & Ad. 616; E. C. L. R. 22; *R. v. Cheadle*, 3 B. & Ad. 833; E. C. L. R. 23.

^m *Supra*, tit. BEST EVIDENCE. The appellants having proved that the pauper occupied a tenement of £10 per annum, and paid rent and taxes for it, the respondents attempted to prove by parol that the letting was to the pauper and two

a prisoner before a magistrate upon a charge of felony cannot be proved by parol, unless it has been expressly shown that the examination was not taken, as the statute requires, in writing.^a

The same principle applies where private parties have by mutual compact constituted a written document the witness of their admissions and intentions.

To admit oral evidence as a substitute for instruments, to which, by reason of their superior authority and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact, and presumption for the highest degree of legal authority; loose recollection, and uncertainty of memory, for the most sure and faithful memorials which human ingenuity can devise, or the law adopt—to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus *652] *be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices.^o

As oral evidence is inadmissible for the purpose of supplying an omission in an instrument where written evidence is required by law: so it is inadmissible to give any effect to a written instrument which is void in law for inconsistency, repugnancy, or ambiguity in its terms; for if a meaning could be assigned, by the aid of extrinsic evidence, to that which was apparently destitute of meaning, or if the same instrument could be made to operate in different ways, according to the weight of oral evidence, it is plain that the effect would depend, not upon the instrument, but upon the force

others; on cross-examination it appeared that the letting was by a written instrument; held that it was necessary to produce it; *R. v. Rawden*, 8 B. & C. 708; E. C. L. R. 15; *Fenn v. Griffith*, 6 Bing. 533; E. C. L. R. 19.

^a Vol. II. tit. ADMISSION; see 11 & 12 Vict. c. 42, s. 18.

^o *Haynes v. Hare*, 1 H. B. 659; *Buckler v. Millerd*, 2 Vent. 107; *Clifton v. Walmesley*, 5 T. R. 564; *Tinney v. Tinney*, 3 Atk. 8; 1 Wils. 34, S. C.; *Mease v. Mease*, Cowp. 47. It would be inconvenient, observes Lord Coke, (see *Countess of Rutland's case*, 5 Rep. 26,) that matters in writing, made by advice and on consideration, and which finally imports the certain truth of the agreement of the parties, should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers and all others in such cases, if such rude averments against matter in writing should be admitted.

of the oral evidence, and thus the latter would virtually be substituted for the former.

An important distinction has already been adverted to between ambiguities which are *apparent* or *patent* on the face of an instrument, and those which arise in the *application* of an instrument of clear and definite meaning to doubtful subject-matter. An ambiguity, apparent on reading an instrument, is termed *ambiguitas patens*; that which arises merely upon its application, *ambiguitas latens*. The general rule of law is, that the latter species of ambiguity may be removed by means of parol evidence, the maxim being, "*Ambiguitas verborum latens verificatione suppletur: nam quod ex facto oritur ambiguum verificatione facti tollitur.*"^p On the other hand, it is a settled rule that *such evidence is inadmissible to explain an ambiguity *apparent* on the face of the instrument.^q [*653]

By *patent* ambiguity must be understood an ambiguity inherent in the words, and incapable of being dispelled either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms in themselves unmeaning or unintelligible, are incapable of receiving a known conventional meaning. The great principle on which the rule is founded is, that the *intention* of parties should be construed, not by vague evidence of their *intentions*, *independently of the expressions* which they have thought fit to use, but by the *expressions themselves*. Now those expressions which are incapable of any legal construction and interpretation^r by the rules of art, are either so because they are in themselves unintelligible, or because, being intelligible, they exhibit a plain and obvious uncertainty.^s In the first instance, the case admits of two varieties: the terms, though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language,^t as when mercantile terms^u are used, which amongst mercantile men

^p See Lord Bacon's Elements of the Common Law, Regula, 23.

^q *Ambiguitas patens* is never holpen by averments; *Ibid.*

^r It is a general rule that a patent ambiguity is always, if possible, to be removed by construction and not by averment; *Colpoys v. Colpoys*, 1 Jac. 451.

^s As where an estate is left by will to one of the three sons of J. S. without specifying which.

^t And see where expressions grammatically ambiguous may be explained, *post*, p. 709.

^u *Robertson v. Jackson*, 2 C. B. 412; E. C. L. R. 52; *Lewis v. Marshall*, 7 M.

bear a distinct and definite meaning, although others do not comprehend them: *the term used may, on the other hand, be *654] capable of no distinct and definite interpretation. Now it is evident that, to give effect to an instrument, the terms of which, though apparently ambiguous, are yet capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the *expressed* meaning; and that, on the other hand, where either the terms used are incapable of any certain or definite meaning, or being in themselves intelligible exhibit a plain and obvious uncertainty, and are equally capable of different applications, to give an effect to them by extrinsic evidence as to the *intention* of the party, would be to make the supposed intention operate independently of any definite expression of such intention. By *patent* ambiguity, therefore, must be understood an inherent ambiguity, which cannot be removed either by the ordinary rules of legal construction, or by the application of extrinsic and explanatory evidence, showing that expressions *primâ facie* unintelligible are yet capable of conveying a certain and definite meaning.

According to these principles, parol evidence is never admissible to explain an ambiguity which is not raised by extrinsic facts.[†] Thus, upon a devise to one of the sons of *J. S.*, who has several,

& G. 729; E. C. L. R. 49; *Drummond v. Attorney-General*, 2 H. of L. C. 837; *Bold v. Rayner*, 1 M. & W. 343; *Spicer v. Cooper*, 1 Q. B. 424; E. C. L. R. 41; *Clayton v. Gregson*, 5 A. & E. 302; E. C. L. R. 31; *Simpson v. Margitson*, 11 Q. B. 23; E. C. L. R. 63; and see other cases, *post*, pp. 701, 705.

* Thus, where a creditor agreed with others to watch a commission of bankrupt, supposed to be fraudulent, "and to contribute in the usual way," parol evidence was admitted to show that by that expression it was meant that each creditor should contribute in proportion to his claim against the bankrupt, without mutual responsibility; *Taylor v. Cohen*, 4 Bing. 53; E. C. L. R. 13. So in the case of a will where its characters are difficult to be deciphered, or its language is unintelligible to an ordinary reader, the testimony of persons skilled in deciphering writing, or who understands the language, is admissible for the purpose of explanation; *Goblet v. Beechey*, 3 Sim. 24; *Masters v. Masters*, 1 P. Wms. 421; *Norman v. Morrell*, 4 Ves. 769. So if the testator express himself in terms peculiar to a particular trade or calling; *Smith v. Wilson*, 3 B. & Ad. 728; E. C. L. R. 23; *Richardson v. Watson*, 3 B. & Ad. 787; E. C. L. R. 23; *Attorney-General v. Plate Glass Company*, 1 Anst. 39.

† *Doe v. Westlake*, 4 B. & Ald. 57; E. C. L. R. 6; *Saunderson v. Piper*, 5 Bing. N. C. 425; E. C. L. R. 35.

evidence is not admissible to *show that one in particular was meant; * and the devise is void for uncertainty.^{a1} [*655]

As oral evidence is inadmissible either as a substitute for a written instrument required by law, or to give effect and operation to such an instrument where it is defective, it follows *à fortiori* that it is not admissible to contradict, or even to vary, any instrument to which an exclusive operation is given by law, whether that exclusive quality result from a positive rule of law,^b or from private compact.

Where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties as the expositor of their intentions, is the only instrument of evidence in respect of that agreement, which the law will recognise so long as it exists, for the purposes of evidence.^c If the parties have contracted by

^a 2 Vern. 624, 625; *Lord Cheyney's case*, 5 Co. 68, *q. v.*; *Harris v. Bishop of Lincoln*, 2 P. Wms. 137, *infra*. In *Harris v. Bishop of Lincoln*, 2 P. Wms. 135, where a man limited his estate by will to his own right heirs by his mother's side, Lord Macclesfield held that he might mean either the heir of his mother's father, or of his mother's mother, and admitted parol evidence to prove which he meant. But see *Doe v. Hiscocks*, 5 M. & W. 363.

^b *Ibid.*

^c *E. g.* under the Statute of Frauds; *Marshall v. Lynn*, 6 M. & W. 109.

^c *Preston v. Merceau*, 12 Bl. R. 1249; *Hodges v. Drakeford*, 1 N. R. 270; *Pym v. Blackburn*, 3 Ves. 34. It is a general rule, that where an agreement has been reduced to writing, evidence of oral declarations, though made at the same time, shall not be admitted to contradict or to alter it; and see *per* Lord Denman, C. J., *Goss v. Lord Nugent*, 5 B. & Ad. 64; E. C. L. R. 27. A written agreement, however, where it is not under seal, may be altered by the addition of new terms by an oral agreement, which, in fact, constitutes a new agreement, incorporating the former one; or, as has been seen, such an agreement may be wholly discharged by parol, before any breach has occurred; *Lord Milton v. Edgworth*,

¹ Latent ambiguity may be explained by parol evidence; *Wilson v. Robertson* 7 J. J. Marshall, 78; *Crawford v. Jarrett*, 2 Leigh. 630; *Peisch v. Dixon*, 1 Mason, 9; *Bank of United States v. Dana*, 6 Peters, 51; *Waterman v. Johnson*, 13 Pick. 261; *Patrick v. Grant*, 2 Shepley, 233; *Doe v. Jackson*, 1 Smedes & Marshall, 494; *Paysant v. Ware*, 1 Alabama, 160; *Brainerd v. Cowdry*, 16 Conn. 1; *Harris v. Doe*, 4 Blackf. 369; *Ward v. Espy*, 6 Humph. 447.

A patent ambiguity cannot be explained; *Webster v. Atkinson*, 4 N. Hamp. 21; *Davis v. Davis*, 8 Missouri, 56; *Richmond Trading Co. v. Farquar*, 8 Blackf. 89; *Hyatt v. Pugsley*, 23 Barb. 285.

The rule of Lord Bacon that "*ambiguitas patens*, is never holpen by averment" is subject to qualification, and parol evidence may be admissible to explain a written agreement; *Fish v. Hubbard*, 21 Wend. 651.

Where a word is abbreviated in a writing proof may heard to show its meaning or what particular word it was intended to abbreviate; *Hite v. The State*, 9 Yerger, 357.

*656] deed, as the *obligation under seal imports greater delibera-
 *657] tion and more solemnity than a mere written agreement which
 is not under seal, no evidence, whether oral or written,
 *which is not under seal, can be admitted to contradict or to
 vary it.^a

5 Bro. P. C. 313. In such cases it is obvious that the evidence is adduced, not to vary the terms of an existing original agreement, but to show that it has been superseded or discharged. And, in *Bywater v. Richardson*, 1 Ad. & E. 508; E. C. L. R. 28, it was held that a written warranty of the soundness of a horse might be limited to twenty-four hours, by rules painted on a board at the place of sale; and see *Smart v. Hyde*, 8 M. & W. 723; *Jeffery v. Walton*, 1 Stark. C. 267; E. C. L. R. 2. What took place in court previous to a rule being made is inadmissible, the court can only look to the rule itself; *Edwards v. Cooper*, 3 C. & P. 277; E. C. L. R. 14. The auctioneer's declarations, where there are printed conditions which are signed, are inadmissible; *Gunnis v. Erhart*, 1 H. B. 289; *Powell v. Edmonds*, 12 East, 6. So in *Shelton v. Livius*, 2 C. & J. 411, where the auctioneer signed a memorandum referring to the particulars of sale. But where the particulars are not signed, or are not referred to in the contract, the auctioneer's declaration that some of the articles in the catalogue are different from their description therein, is admissible; *Eden v. Blake*, 13 M. & W. 614, *post*. In an action for work and labour, in building, it appeared that there was an agreement in writing relating to the claim, and the plaintiff was not allowed to proceed without producing it, nor even to recover for items as extras, as the agreement was the proper evidence to show what the extras were; *Vincent v. Cole*, M. & M. 257; E. C. L. R. 22; *Jones v. Howell*, 4 Dowl. 176; *Buxton v. Cornish*, 12 M. & W. 426. Where, in an action for use and occupation, it appeared, upon cross-examination of the plaintiff's witness, that there was an agreement in writing, which could not be produced not having been stamped, the plaintiff was nonsuited; *Brewer v. Palmer*, 3 Esp. 213; *R. v. Rawden*; *Fenn v. Griffith*, *supra*, note (m). The rule does not apply where a mere memorandum has been made in writing preparatory to an agreement, but has not been signed as such; *Doe v. Cartwright*, 3 B. & Ald. 326; E. C. L. R. 5; nor where a document containing the terms of holding has been read over to a tenant, who does not sign, but acquiesces and holds under them; *Lord Bolton v. Tomlin*, 5 A. & E. 856; E. C. L. R. 31; *Trewhitt v. Lambert*, 10 A. & E. 470; E. C. L. R. 37; nor where the terms of a statute-hiring were supposed to have been put down at the time by the chief constable's clerk, but the parties did not sign (or, as far as appeared, read) the writing; *R. v. Inhabitants of Wrangle*, 2 A. & E. 514; E. C. L. R. 29; nor where the terms of a verbal contract of sale are afterwards put into writing by the vendor or his agent, as a memorandum of the transaction to assist his recollection, but are not signed by the vendee; *Allen v. Pink*, 4 M. & W. 140; *Dalison v. Stark*, 4 Esp. 163; nor where the writing does not contain all the terms of the agreement; *Lockett v. Nicklin*, 2 Ex. 93.

^a *Lainson v. Tremere*, 1 A. & E. 792; E. C. L. R. 28; *West v. Blakeway*, 9 D. P. C. 846. A particular of sale, or agreement for the purchase, is not admissible to show what was conveyed by the deed of conveyance; *Doe v. Webster*, 12 A. & E. 442; E. C. L. R. 40; *Williams v. Morgan*, 15 Q. B. 782; E. C. L. R.

Where the issue was on the plea of *plene administravit*, evidence that the defendant upon executing a bond of submission to arbitration, had agreed to pay what should be awarded to be due, was rejected, as being either *contradictory of, or in addition to the agreement in the bond.^e So, oral evidence is not admissible to show that a bond, conditioned for the payment of money to the wife in case she survived, was intended in lieu of dower.^f Nor is such evidence admissible to show that a clause of redemption was omitted in an annuity-deed, lest it should render the transaction usurious.^g [*658]

69. And where a subsequent parol agreement is inconsistent with a deed, it cannot be set up against the deed; *Leslie v. De la Torre*, cited 12 East, 583, *post*, p. 661. Where a deed stated the purchase-money of land to have been paid, evidence is inadmissible of an agreement that part should be satisfied by work to be done by the purchaser, and that the money had not been paid; *Baker v. Dewey*, 1 B. & C. 704; E. C. L. R. 8; *Baker v. Heard*, 5 Ex. 959. Where parties contract by deed, *assumpsit* will not lie; for where a man resorts to a higher security the law will not raise an *assumpsit*; *Toussaint v. Martinnant*, 2 T. R. 100; as where a surety takes a bond from his principal; *Ib.* So where a lessor assigns his lease by the words "grant and assign," but without any express covenant for quiet enjoyment, and the assignee is distrained upon for rent due before the assignment, he cannot sue the assignor in *assumpsit* for money paid because of the covenant contained in the word "grant;" *Baber v. Harris*, 9 A. & E. 533; E. C. L. R. 39; but see 8 & 9 Vict. c. 106, s. 4; and a simple contract debt is merged in a bond given for it; *Price v. Moulton*, 20 L. J., C. P. 102. So a plaintiff cannot recover in *indebitatus assumpsit* upon an executed consideration, where the contract was by deed; *Atty v. Parish*, 1 N. R. 104; see *Pardoe v. Price*, 16 M. & W. 451. But an action of *assumpsit* may be maintained upon an agreement subsequent to the making a deed of charter-party, the parol contract not being inconsistent with the contract by deed; *White v. Parkins*, 12 East, 578; *Morton v. Burn*, 7 A. & E. 19; E. C. L. R. 34. So where a mortgage deed contained no covenant to pay the money lent, debt for money lent will lie; *Yates v. Aston*, 4 Q. B. 182; E. C. L. R. 45. Where the obligor of a *respondentia* bond promised, by indorsement upon it, to pay the amount to any assignee, it was held that an assignee might maintain *indebitatus assumpsit*; *Fenner v. Mears*, 2 Bl. 1269; but this was doubted by Lord Kenyon, in *Johnson v. Collings*, 1 East, 104, and by Bayley, J., in *White v. Parkins*, 12 East, 582; and is put by Blackstone, J., in his judgment, on the ground of the whole of the transactions, one of which was an extension of time.

^e *Pearson v. Henry*, 5 T. R. 6: the evidence was rejected at the trial; and upon motion for a new trial the propriety of the rejection was not disputed; 1 Bro. C. C. 54, 93; and see the observations of Blackstone, J., in *Preston v. Merceau*, Bl. 1250; and *infra*, 662.

^f See *Mascal v. Mascal*, 1 Ves. sen. 323; *Finney v. Finney*, 1 Wils. 34; *infra*, 666, note (z).

^g *Lord Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Bro.

Where *A.* granted an annuity for his own life to *B.*, which was secured by a bond and warrant of attorney, and judgment was entered, the court would not, after the death of *B.*, permit the attorney of *B.* to prove a parol agreement that *A.* should be at liberty to redeem the annuity on terms.^h

*659] *So, in an action on a bond conditioned for payment absolutely, the defendant cannot plead an agreement that it should operate merely as an indemnity.ⁱ Where a modern lease by deed uses the term *Michaelmas*, evidence is inadmissible to show that *Old Michaelmas* was meant.^k

In an action of trespass, where the defendant insists upon a release executed by the plaintiff, in terms including the trespass in question, the plaintiff cannot defeat the effect of the release by proof that the arbitrators who awarded the release have not taken into consideration the particular trespass.^l

So, although it is an established rule that a party may aver another consideration which is *consistent* with the consideration

C. C. 219; *Hare v. Shearwood*, 3 Bro. C. C. 168; 1 Ves., jun. 241. But where a man and woman, being about to marry, conveyed their lands to trustees, in trust, to dispose of the rents as the wife, without the consent of the husband, should appoint; notwithstanding which the husband received the rents during his life, and the wife after his death filed a bill in equity for an account, the Court admitted parol evidence to prove that, before the settlement was made, the husband and wife agreed that the premises should be in trust for them during their joint lives, and that they were settled otherwise merely to protect them from sequestration by Cromwell; and on that ground relieved against a covenant in the settlement, by which the trustees were bound to pay the rents as the wife should appoint; *Harvey v. Harvey*, 2 Ch. C. 180; Fitz. 213. But where articles were reduced to writing, and signed by the parties, and afterwards drawn up at length, and executed, Reynolds, B., held that the articles could not be restrained by the memorandum, there being no reference from the articles to the memorandum; *Lloyd v. Wynne*, 5 G. 2; 1 Ford. 136.

^h *Haynes v. Hare*, 1 H. Bl. 659; and, *per* Lord Thurlow, nothing can be added to a written agreement, unless there be a clear subsequent independent agreement varying the former; but not where it is matter passing at the same time with the written agreement; *Rich v. Jackson*, 4 Bro. C. C. 519; *Lord Portmore v. Morris*, 2 Bro. C. C. 219.

ⁱ *Mease v. Mease*, Cowp. 47; *Ridout v. Bristow & Ux.*, 1 C. & J. 231.

^k *Doe v. Lea*, 11 East, 312; *Smith v. Walton*, 8 Bing. 238; E. C. L. R. 21; and see *Cadby v. Martinez*, 11 A. & E. 720; E. C. L. R. 39. But in the case of a parol demise, such evidence was admitted; 4 B. & Ald. 588; E. C. L. R. 6. Where a written agreement stipulates that goods are to be taken on board *forthwith*, it cannot be shown by parol that in *two days* was meant; *Simpson v. Henderson*, M. & M. 300; E. C. L. R. 22.

^l *Shelling v. Farmer*, Str. 646.

expressed, *e. g.*, as being in addition to it, or as included in its general terms, no averment can be made contrary to that which is expressed in the deed.^m Where the conveyance is mentioned to be in consideration of love and affection, as also for other considerations, proof may be given of any other, for this is consistent with the terms of the deed.ⁿ But if one *specific* *consideration be alone mentioned in the deed, it has been said that no proof [*660 can be given of any other, for this would be contrary to the deed; for where the deed says it is in consideration of such a particular thing, it imports the whole consideration, and negatives any other.^o The case where no consideration is expressed in the deed, is, according to Lord Hardwick, a middle case; and he held that proof of a valuable consideration in such a case was admissible.^p But in general, as will be seen, evidence as to the real consideration is in all cases admissible with a view to prove fraud,^q or to rebut the presumption of fraud.^r

Upon the same principles, evidence is inadmissible of a parol agreement prior to or contemporary with the written instrument, and which varies its terms; as to show that a note made payable on a day certain was to be payable upon a contingency only,^s or

^m *Mildmay's case*, 1 Co. Rep. 174; *Bedell's case*, 7 Co. Rep. 40; 2 Roll. Ab. 786. As that the consideration was different from that expressed in the deed; *Hill v. Manchester and Salford Waterworks*, 2 B. & Ad. 544; E. C. L. R. 22; *Lainson v. Tremere*, 1 A. & E. 792; E. C. L. R. 28; *Carpenter v. Buller*, 8 M. & W. 209; where it was held that a recital in an instrument, even not under seal, may have the same effect; *Bowman v. Taylor*, 2 A. & E. 278; E. C. L. R. 29; *Wiles v. Woodman*, 5 Ex. 557.

ⁿ *Per* Lord Hardwicke, *Peacock v. Monk*, 1 Ves. 128; and see *Villiers v. Beaumont*, 2 Dyer, 146, a; *Vernon's case*, 4 Rep. 3; 7 D. & L. 141.

^o *Ibid.*; *Green v. Weston*, Say. 209; *Stratton v. Rastall*, 2 T. R. 366; but see *Gale v. Williamson*, 8 M. & W. 405; *Clifford v. Turrell*, 1 Y. & C., N. C. 138.

^p *Peacock v. Monk*, 1 Ves. 128.

^q *Infra*, p. 672.

^r *Gale v. Williamson*, 8 M. & W. 405.

^s *Rawson v. Walker*, 1 Stark. C. 361; E. C. L. R. 2; *Foster v. Jolly*, 1 C. M. & R. 703; *Adams v. Wordley*, 1 M. & W. 374; *Campbell v. Hodgson*, Gow. 74; E. C. L. R. 5; *Brown v. Langley*, 4 M. & G. 466; E. C. L. R. 43; see *Webb v. Salmon*, 7 D. & L. 324; *Moseley v. Hanford*, 10 B. & C. 729; E. C. L. R. 21. It is not, it seems, competent to a party who appears on the face of a promissory note to be a principal, to show that he is merely a surety; *Price v. Edmonds*, 10 B. & C. 578; E. C. L. R. 21; see *Fentum v. Pocock*, 5 Taunt. 192; E. C. L. R. 1; *Fox v. Frith*, 10 M. & W. 131; *Healey v. Story*, 3 Ex. 3. But although a consideration be alleged in the bill or note, a party may show it to have failed, or to have been illegal, or that the consideration was really a different one; *Solly v. Hinde*, 2 C. & M. 516; *Abbott v. Hendricks*, 1 M. & G. 791; E. C. L. R. 39.

upon some other day,^t or not until the death of the maker." Where
 *661] a policy was on an adventure from *Archangel to Leghorn.
 the defendant was not allowed to prove an agreement, previous to the signing of the policy, that the adventure should begin from the downs only.^x Where a ship was chartered to wait for convoy at *Portsmouth*, it was held that evidence could not be received of an agreement to substitute *Corunna* for *Portsmouth*.^y

Where a contract is entered into for the sale of goods, and a bill of sale afterwards executed, the bill of sale is the only evidence of the contract which cannot be received, and parol evidence of the agreement cannot be received, although the written instrument of sale be inadmissible for want of a stamp.^a

In general, where a contract has been reduced into writing, nothing which is not found in the writing can be considered as part of the contract.^b

*662] ^cThe same rule applies if such parol agreement *add* to the terms expressed. Thus, where the agreement was, that *A.*, for certain considerations, should have the produce of *Boreham's Meadow*, it was held that he could not prove by parol that he was to have both

^t *Free v. Hawkins*, 8 Taunt. 92; E. C. L. R. 4. Or that it should be renewed; *Hoare v. Graham*, 3 Camp. 57; and *post*, p. 666.

" *Woodbridge v. Spooner*, 3 B. & Ald. 233; E. C. L. R. 5; unless indeed by way of proving want of consideration; *Solly v. Hinde*, 2 C. & M. 516; see tit. *BILLS OF EXCHANGE*, Vol. II. So parol evidence is unavailing to show that a transfer of a ship, which was absolute on the bill of sale, was intended as a security only; *Robinson v. M'Donnell*, 2 B. & Ald. 134.

^x *Kaines v. Knightly*, Skin. 54; *Uhde v. Walters*, 3 Camp. 16; *Weston v. Emes*, 1 Taunt. 115. Note, *Kaines v. Knightly* is cited in *Bates v. Grabham*, 2 Salk. 444, but misstated.

^y *Leslie v. De la Torre*, cited 12 East, 583. Note, that the charter-party was under seal.

^a *Lano v. Neale*, 2 Stark. C. 105; E. C. L. R. 3. The previous contract there was for a ship, forty tons of iron kintlage, &c. The bill of sale was of a ship, together with all stores, &c., in the usual form, and silent as to kintlage; and held that the vendee could not recover for non-delivery of the kintlage.

^b *Per* Lord Kenyon, in *Rolleston v. Hibbert*, 3 T. R. 413; and see *Drakeford v. Hodges*, 1 N. R. 270, where it was held, that if a parol warranty or agreement to assign be reduced to writing, and the assignment be afterwards legally executed, the warranty cannot be proved by parol.

^c P. C. in *Kain v. Old*, 2 B. & C. 634; E. C. L. R. 9. Note, that the first agreement was in writing, but void for not reciting the certificate of the ship's registry; and see *Meyer v. Everth*, 4 Camp. 22; *Gardiner v. Gray*, 4 Camp. 144; *Powell v. Edmonds*, 12 East, 6; *Hope v. Atkins*, 1 Price, 143; *Pickering v. Dowson*, 4 Taunt. 779; and *Countess of Rulland's case*, *supra*; and tit. *WARRANTY*.

the soil and produce of Millcroft and Boreham's Meadow;^c and in the case of *Preston v. Merceau*,^d the landlord, in an action for use and occupation, under a written agreement for rent at £26 per annum, was not allowed to show, *in addition*, by parol evidence, that the tenant had also agreed to pay the ground-rent. Mr. J. Blackstone is said in that case to have observed. that although the court could neither alter the rent, nor the terms which were expressed in the agreement, yet that with respect to collateral matters it might be different; the plaintiff might show who was to put the house into repair, or the like, concerning which nothing was said. The question, how far collateral matter may be proved by parol, will be considered hereafter.^e At present it may be observed, that where an agreement specifies only the rent and the term, but is silent as to repairs, it is obvious that such an agreement may be as completely varied by proof of an additional stipulation that the landlord should lay out a specific sum in alterations, as by evidence that the rent shall be diminished, without any stipulation as to repairs. Cases in which the additional terms constitute in fact a new agreement, incorporating the former written terms,^f or continuing the former *contract,^g or amount to a substantive collateral agreement;^h those also, where certain terms

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^c *Meres v. Ansell*, 3 Wils. 275; and see *Hope v. Atkins*, 1 Price, 143.

^d *Preston v. Merceau*, 2 Bl. 1249. So, in *Rich v. Jackson*, 4 Bro. C. C. 515, where an agreement specified the rent and the term, but was silent as to taxes, the Court refused to receive parol evidence on the part of the lessor, that previous to the drawing up of the memorandum it had been agreed and understood by the parties that the rent was to be paid clear of all taxes.

^e *Infra*, pp. 710, 716, *et seq.*

^f Where one written instrument refers to another, from which it requires explanation, with sufficient certainty, the latter is virtually incorporated with the former, and may be said to give effect to it. But it is a general rule of law, that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of the paper meant to be incorporated, in such a way that the Court can be under no mistake; *per Lord Eldon, C., Smart v. Prujean*, 6 Ves. 565; and see *Clayton v. Lord Nugent*, 13 M. & W. 200.

^g *Supra*, p. 657; *Littler v. Holland*, 3 T. R. 590; *Marshall v. Lynn*, 6 M. & W. 109, *infra*, p. 725; and see *Warren v. Stagg*, cited 3 T. R. 591; *Cuff v. Penn*, 1 M. & S. 21; *Lord Milton v. Edgworth*, 5 Bro. P. C. 313.

^h *Granville v. Duchess of Beaufort*, 1 P. Wms. 114; 2 Vern. 648. A person, to whom money was due from the vendor of goods sold by auction, agreed with the owner, before the auction, that the price of anything she might buy should be set against the debt, and she became the purchaser of goods and was entered as such by the auctioneer; she was held not bound by the conditions of sale, one of which

are engrafted upon an agreement, which is silent on the point, by some known custom, or general understanding;ⁱ and lastly, those where the instrument offered as evidence to prove a collateral fact, has, in the particular instance, no exclusive operation,^k fall, as will be seen, under a different consideration.

At present, assuming the particular instrument to be that which the parties have agreed upon as the evidence of their intentions in respect of the particular transaction, the only question is, whether the parol evidence, which is adduced to superadd something to the written agreement, does not vary that agreement; if it does, it is inadmissible.

Where the conditions of sale described only the number and kind of timber-trees to be sold by lot, but said nothing as to the weight of the timber, the defendant, in an action for not completing his purchase according to the conditions, was not permitted to prove that the auctioneer had, at the sale, warranted the timber *664] to amount to a certain weight; *for if that representation induced him to become the purchaser, he ought to have had it reduced to writing at the time.¹ Lord Ellenborough, in that case, observed, that if such evidence were admissible, in what instance might not a party, by parol testimony, superadd any term to a written agreement? which would be setting aside all written contracts, and rendering them of no effect. In such cases it is to be presumed that the parties, in expressing their intention, have expressed the whole of it, subject to those incidents and consequences which the law annexes to the terms which they have used. Hence, where a written agreement for the sale of goods is silent as to the time of delivery, in which case the law implies a contract to deliver them within a reasonable time, to be judged of according to the circumstances, evidence is inadmissible of a contemporaneous oral contract by the purchaser to take them away immediately.^m

was that the purchaser should pay a part of the price at the time of sale and the rest on delivery; *Bartlett v. Purnell*, 4 A. & E. 792; E. C. L. R. 31.

ⁱ *Infra*, p. 710.

^k *Infra*, p. 716, *et seq.*

¹ *Powell v. Edmonds*, 12 East, 6; and see *Buckmaster v. Harrop*, 13 Ves. 471; *Shelton v. Livius*, 2 C. & J. 411; *Higginson v. Clowes*, 15 Ves. 516; *Jenkinson v. Pepys*, cited 6 Ves. 330; *Rich v. Jackson*, 4 Bro. C. C. 515; *Gunnis v. Erhart*, 1 H. Bl. 289. But where, previous to the sale of a leasehold estate by auction, the purchaser promised the vendor to indemnify him against the covenants entered into by the lessee, a specific performance was decreed, although the terms of the sale were silent as to such indemnity; *Pember v. Mathers*, 1 Bro. P. C. 54.

^m *Greaves v. Ashlin*, 3 Camp. 426; *Halliley v. Nicholson*, 1 Price, 404. Where

Where *A.* agreed to take *B.* into partnership as an attorney, no time being mentioned, it was held that the partnership commenced from the time of the agreement, and that evidence was inadmissible to show that the agreement was not to take effect until *B.*, who was not then an attorney, should be admitted.^a

*One who executes an instrument in his own name cannot defeat an action by showing that he did so merely as agent for another.^o Nor, if a person is known to have been agent for the defendant and as such has always used his own name to bind the defendant, can the defendant show that a contract made in that form, by such person, was made on his own account and after he had ceased to be agent, that fact not having been previously known to the plaintiff.^p Nor can a principal, whose agent contracts in writing in his own name and therein describes himself as owner of the thing as to which he contracts, show that the agent was merely such and sue upon that contract as principal.^q But in an action on a written contract between the plaintiff and a third party, evidence on the part of the plaintiff is admissible to show that the contract was in fact made by the third party, not on his own account but as the agent of the defendant.^r

Where no date, or an impossible one, is inserted in a deed, date is construed to mean delivery; but where a date is given, and an act is to be done at a certain time from the date, the party bound cannot allege a different time of delivery, with a view to alter the time of performance.^s

goods are ordered by letter without any mention of a time of payment, and they are sent with an invoice, the letter and invoice not amounting to a contract, parol evidence may be given that they were sold on credit; *Lockett v. Nicklin*, 2 Ex. 93.

^a *Williams v. Jones*, 5 B. & C. 109; E. C. L. R. 11; and see similar instances where reasonable time, or some other term, was not expressed, but implied by law; *Greaves v. Ashlin*, 3 Camp. 426; *Ford v. Yates*, 2 M. & G. 549; E. C. L. R. 40.

^o *Magee v. Atkinson*, 2 M. & W. 440. Whether his principal were or were not known at the time of the contract; *Jones v. Littledale*, 6 A. & E. 486; E. C. L. R. 33; *Higgins v. Senior*, 8 M. & W. 834.

^p *Trueman v. Loder*, 11 A. & E. 589; E. C. L. R. 39.

^q *Humble v. Hunter*, 12 Q. B. 310; E. C. L. R. 64. But the mere fact of a principal having in the contract described himself as agent, but not having named any principal, will not prevent his suing on the contract; *Schmalz v. Avery*, 20 L. J., Q. B. 228.

^r *Wilson v. Hart*, 7 Taunt. 295; E. C. L. R. 2. Or that a third party was a dormant partner with the defendant who signed the contract, although at the time of contracting the plaintiff did not know that fact; *Beckham v. Drake*, 9 M. & W. 79, confirmed in *Cam. Scacc.* 11 M. & W. 315.

^s *Styles v. Wardle*, 4 B. & C. 908; E. C. L. R. 10; Co. Litt. 46, b.; Com. Dig.

*666] *Parol evidence is also inadmissible for the purpose of altering the legal operation of an instrument, by evidence of an *intention* to an effect which is not expressed in the instrument.¹

Thus the defendant cannot be admitted to prove that at the time of making a promissory note it was agreed, that when the note became due payment should not be demanded, but that the note should be renewed.² So, also, parol evidence is inadmissible to show that a bond, purporting to be absolute, was *intended* merely as an indemnity, and that the plaintiff has not been damnified;³ or to show that the directions of a will were intended to operate in satisfaction of a bond;⁴ or that a bond given by the husband before marriage, conditioned to secure £400 to the wife, in case she survived the husband, was given in lieu of dower.⁵ Where a man

Fait, b. 3; *Ofley v. Hicks*, Cro. Jac. 264; and *infra*, tit. DEED; *Armit v. Breame*, 2 Lord Raym. 1076. But where a lease, dated Lady-day, 1783, purported to commence on Lady-day *last past*, evidence was admitted to show that the lease was in fact executed after the date, and consequently that the term commenced Lady-day, 1783, not 1782; *Steele v. Mart*, 4 B. & C. 272; E. C. L. R. 10; see *Doe v. Ulph*, 13 Q. B. 204; E. C. L. R. 66.

¹ In equity, however, it seems that parol evidence is admissible to show that the testator intended that specific legacies should be paid out of particular funds; *Cliff v. Gibbons*, Lord Raym. 1324. But not to show that a testator intended to exempt his personal estate from debts; see *Reeves v. Newenham*, 2 Ridg. 21, 35, 44.

² *Hoare v. Graham*, 3 Camp. 57; *Webb v. Salmon*, 7 D. & L. 324, in Cam. Scac.; *Hogg v. Snaith*, 1 Taunt. 347; see tit. BILLS OF EXCHANGE.

³ *Mease v. Mease*, Cowp. 47. Or that where a bond was conditioned for payment of the rent of certain premises recited in the condition to have been demised by indenture at a specified rent, the rent mentioned in the indenture was less than that in the condition, and had been paid; *Lainson v. Tremere*, 1 A. & E. 797; E. C. L. R. 28. See *ante*, p. 660, note (u).

⁴ *Jeacock v. Falkener*, 1 Bro. C. C. 295.

⁵ *Finney v. Finney*, 1 Wils. 34. But where a man, who had agreed to settle 100l. a year on his intended wife, finding himself ill, made his will, and afterwards left her 100l. a year, and recovering, married her, *Clarke, B.*, held, that evidence was admissible to show that he intended her one of the annuities only; *Mascal v. Mascal*, 1 Ves. sen. 323; but see 7 Will. IV. and 1 Vict. c. 26, and tit. WILLS.

¹ Evidence of conversation leading to a contract is inadmissible; *Gilpins v. Consequa*, Peters C. C. 86. All anterior and contemporaneous stipulations and representations are merged in the writing and cannot be given in evidence; *Gooch v. Conner*, 8 Missouri, 391; *Parkhurst v. Cortlandt*, 1 Johns. Ch. Rep. 274; *Crosier v. Acer*, 7 Paige Ch. Rep. 137; *Ellmaker v. Franklin Fire Ins. Co.*, 5 Barr, 183; *Bedford v. Flowers*, 11 Humph. 242.

Parol evidence is inadmissible to explain the intentions of a party to a deed; *Child v. Wells*, 13 Pick. 121; *Paysant v. Ware*, 1 Alabama, 160; *Brockett v. Bartholomew*, 6 Metcalf, 396.

conveyed his *estate to certain uses, reserving to himself the power of changing or revoking them, and afterwards conveyed it to trustees, in trust to pay his debts, and then in trust to reconvey, it was held that a proof of a declaration by one of the trustees under the latter deed, that the party did not intend to revoke the former by the latter, was inadmissible.^a [*667]

Parol evidence of the *intention* of the testator is in no case admissible to contradict the express terms of a will.^b Where a legacy was given to *A. B.*, and in the case of his death to his wife, and the wife after his death received *the legacy, and the question at law was, whether she received the legacy in her own right, or as her husband's representative, it was held that evidence was inadmissible to prove that the testator when he was *in extremis* had declared his intention to be, that the husband should have the interest only during the life of the wife, and that if she survived him she should have the principal.^c Where a father by his will [*668]

^a By Reynolds, B., and by the Chancellor and Master of the Rolls; *Fitzgerald v. Fauconberge*, Fitz. 207.

^b A testator, having copyhold estates in North C. and South C., devises to his wife all his wines, &c., in addition to the settlement^d made her on his copyhold estate; to his niece *M.* the rents and profits of his new inclosed freehold cow-pasture close in North C. during the life of his wife; and after the decease of his wife, to two nephews, his furniture, &c., and all his copyhold estates in North C. and South C. It was held, that as there was no ambiguity on the face of the will, or in the application of it, the testator having copyhold estates in North C. and South C. which answered the description, extrinsic evidence was not admissible to show that the description in the settlement included a freehold close, which was mistakenly enumerated there as *copyhold*; and that by all his copyhold estates in North C. and South C. this freehold passed, although the settlement was referred to in the will; and that other documents not referred to were inadmissible for that purpose; *Doe dem. Brown v. Brown*, 11 East, 441. A testator gave one of his debtors certain messuages, and after other legacies and devises gave all the rest of his estate, not thereby devised, to his executors, or such of them as should act, and made that debtor and *J. S.* his executors. They both acted, and *J. S.* filed a bill against the debtor for a proportion of his debt; the debtor offered parol evidence to show that the testator meant that the debt should be extinguished, and that he gave the attorney who drew the will instructions to release it; but that the attorney, and a counsel whose opinion was taken, were of opinion that the debt would be released by implication. But Lord Talbot said that the cases went no further than to let in parol evidence to rebut an equity or resulting trust; but as the residuary clause directed the property not before disposed of by the will to be divided between the executors, and as the debt in question had not been previously disposed of by the will, the evidence contradicted the express words of the will; *Brown v. Selwyn*, Ca. temp. Talbot, 240; Bac. Abr. Wills, D.

^c *Lowfield v. Stoneham*, Str. 1261.

made his three brothers, who were presbyterians, together with a clergyman, guardians of his children in general terms, King, Chancellor, on a bill filed by the three against the clergyman to have the children delivered up to them, rejected parol evidence of directions alleged to have been given by the testator, that the children should be educated as presbyterians; and he said, that as that was not expressed in the will, parol evidence was no more admissible in the case of a devise of land.^d Oral declarations of the testator cannot be received for the purpose of explaining his intention,^e even where it was apparently ambiguous on the face of the will. Where the testator, after mentioning his wife and niece in his will, afterwards gave a particular estate to *her* for life, the Lord Chancellor refused to receive parol evidence to show which was meant.^f

So such extrinsic evidence is inadmissible to alter the *legal construction* of words, or to effect a legal presumption *arising *569] from the construction.^g Where a legacy was given to *A. B.*, who was dead at the time, it was held, that evidence was not admissible to show the intent of the testator that the legacy should be transmissible.^h Where a devise was to the son of the devisor, and the heirs of his body, on the condition that he, they, or any of them, should not aliene, discontinue, &c.; parol evidence was held to be inadmissible to show the *intention* of the devisor, that the condition should extend to the son and his heirs.ⁱ So it was held to be admissible to show that the testator did not intend to pass the reversion and remainder in fee of certain settled lands, by a devise of all lands, tenements, and hereditaments out of settlement.^k An estate was devised in trust to receive the profits for three years, and if the heiress of the devisor should marry Lord *G.* within that time, in trust for her for life, with remainder to her children in strict settlement; and if the marriage should not happen, in trust for Lord *F.*; the marriage did not take place; and it was held that parol evidence was inadmissible of a declaration by the testator that Lord *G.*'s refusal should not disinherit his heir-at-law.^l

^d *Storke v. Storke*, 3 P. Wms. 51; but see 2 Ves. 589.

^e 2 Vern. 624; 9 Cl. & F. 566.

^f *Castleton v. Turner*, 3 Atk. 257; *Hampshire v. Peirce*, 2 Ves. sen. 216.

^g *Per* Lord Thurlow, 2 Bro. C. C. 521.

^h *Maybank v. Brooks*, 1 Bro. C. C. 84.

ⁱ *Cheyney's case*, 5 Co. 68; 2 Bro. C. C. 521.

^k *Strode v. Falkland*, 2 Vern. 621; but it is stated by Salkeld that the decree was reversed; according to Vernon, it was compromised.

^l *Bertie v. Falkland*, Salk. 231; 2 Vern. 333.

Upon a question of legal construction upon the terms of a will, whether the deviser gave an estate for life, or an estate in fee, Lord Holt was of opinion that the intention of the deviser must be collected, not from collateral matters, but from the will itself; but the other judges were against him, and their opinion was confirmed in the Exchequer Chamber.^m And in some other instances the *courts have taken into consideration the state and circumstances of the family, in order to enable them the better to [670 construe the testator's real intention as to the *personal* estate.ⁿ Where, however, extrinsic evidence is allowed to operate so far as to give to the terms of a will a different construction from that which the terms abstractedly imply, the rule has often been considered to be carried further than is warranted by principle or analogy.^o Where evidence was offered of the value *of an [671 estate charged with sums of money payable to the sisters of the devisee, as an argument in favour of a particular construction,

^m *Cole v. Rawlinson*, Salk. 234; see *Doe v. Fyldes*, Cowp. 833; *Doe v. Dring*, 2 M. & S. 455; *Boote v. Blundell*, 1 Mer. 193; *Goodtitle dem. Richardson v. Edmonds*, 7 T. R. 640; *Standen v. Standen*, 2 Ves. jun. 593; Vin. Ab. tit. Devise, Y, 2, pl. 10; *Pepper & Ux. v. Wineve*, Bac. Ab. tit. Wills, H.

ⁿ See the cases cited in the preceding note; and see *Baldwin v. Karver*, Cowp. 312; where Lord Mansfield observed, that all cases upon the construction of wills depend upon the particular penning of the wills themselves, and the state of the families to which they relate; and, in the case of *Jones v. Morgan*, cited in *Lytton v. Lytton*, 4 Bro. C. C. 441, the same learned Judge observed, that to construe a will, the *intent* is to be taken from the whole will together, applied to the subject-matter to which the will relates. Sir D. Evans, 2 Poth. 212, remarks, also, that Lord Loughborough, in quoting the opinion of Lord Mansfield, took notice of different cases in which certain words were held to apply to a failure of issue at a certain period, although taking the words strictly, and construing them without considering the circumstances, would have imported a general failure of issue; *vide Lytton v. Lytton*, 4 Bro. C. C. 441. In the case of *Masters v. Masters*, (1 P. W. 420,) the testator, after bequeathing a legacy to two particular hospitals in Canterbury, by his codicil bequeathed another sum "to all and every the hospitals." As the testator had by his will taken notice of two hospitals in Canterbury, and as it appeared *in evidence* that he lived there, it was held, that the intention sufficiently appeared to apply the latter bequest to the hospitals in Canterbury. And see the distinction taken by Lord Thurlow in *Jeacock v. Falkener*, 1 Bro. C. C. 296; see *Doe dem. Gord v. Needs*, 2 M. & W. 129.

^o See Lord Hardwicke's observations in *Blinkhorne v. Feast*, 2 Ves. 28; *Strode v. Russell*, 2 Vern. 624; *Castleton v. Turner*, 3 Atk. 258; *Petit v. Smith*, 1 P. Wms. 9; *Brown v. Langley*, 2 Barn. 118; *Brown v. Selwin*, C. temp. Talbot, 240; *Jeacock v. Falkener*, 1 Bro. C. C. 296. The doctrine once prevailed that a court might receive evidence which was inadmissible before a jury; that, however, has since been denied; *per Buller, J.*, 2 H. B. 524.

the Court of King's Bench held that it was nugatory and inadmissible as a matter of proof, although it might have been of great weight had the court been called upon to make a will for the testator.^p In the case of *Doe d. Oxendon* Sir A. Chichester,^q it was observed by Sir V. Gibbs, that courts of law had been jealous of extrinsic evidence for the purpose of explaining the intention of a testator; and he knew of one case only in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances.

The objection does not apply where evidence is offered, not for the purpose of *contradicting* or *varying* the effect of a written instrument of admitted authority, but where on the contrary it is offered in order to *disprove* the legal existence, or rebut the *operation* of the instrument. To do this, is not to substitute mere oral testimony for written evidence, the weaker for the stronger, but to show *672] that the written ought to have no operation whatsoever: an *object which must usually be accomplished by oral evidence.

As a written instrument in general derives its authenticity from the aid of external evidence, it may be defeated in like manner. Thus it may be impeached by extrinsic evidence, on the ground of fraud, even in the case of a record.^r So also, in the case of a private agreement, oral evidence is admissible to prove a fraudulent omission.^s Where there was an agreement for a lease, evidence was admitted of a parol agreement that the rent should be clear of all taxes, but that the plaintiff reduced the agreement to writing

^p *Doe v. Fyldes*, Cowp. 833. In *Oates d. Wigfall v. Brydon*, 3 Burr. 1895, Lord Mansfield went into an inquiry as to value, in order to found an argument upon the result, as to the construction of a will, and in order to show that property of such small value could not be intended to be the subject of particular limitations; but the learned Judge seems to have been of a different opinion in the case of *Doe v. Fyldes*, just cited, where he concurred with the other Judges; and in *Goodtitle d. Richardson v. Edmonds*, 7 T. R. 640, Lord Kenyon intimated that the case of *Oates d. Wigfall v. Brydon* had not been satisfactory to the profession, and that he believed that Lord Mansfield had afterwards doubted whether he had proceeded upon substantial grounds. In the case of *Bengough v. Walker*, 15 Ves. 514, the Master of the Rolls said, "You cannot refer to extrinsic evidence to construe a will, but you may to show with reference to what a will was made."

^q 4 Dow. 65; *infra*, p. 693.

^r Bing. N. P. 172; *Paxton v. Popham*, 9 East, 421; *Doe v. Allen*, 8 T. R. 147; *R. v. Mattingley*, 2 T. R. 12; *Wright v. Crookes*, 1 Sc., N. S. 685. But such evidence is not admissible to defeat a record by showing a rasure, &c.; as that a rasure was made in a precept since it was issued; *Dickson v. Fisher*, Burr. 2267; and see *tit.* FRAUD and JUDGMENT.

^s *Lord Irnham v. Child*, 1 Bro. C. C. 92; 3 Atk. 388, *post*.

without mentioning that point, and that the defendant could not read.[†] In order to impeach a will, and to show that it had been fraudulently submitted to a testator for his signature, parol evidence was admitted, that at the time of signing the will he asked whether the contents were the same with those of a former will, and that he was answered in the affirmative.[‡] So it may be shown that one will was substituted for another.[§] So, in general, it may be shown that fraud and imposition were practised upon a party to an instrument, by a fraudulent omission, or misrepresentation of the contents, especially if the party were illiterate.[¶]¹

*And it is a general principle of law, that where a statute makes a deed void, as for a charitable or superstitious use, [*673 or where it is void at common law, as being *contra bonos mores*, the proof of invalidity may be collected not only from the instrument itself, but from circumstances which, though they do not appear on the face of the deed, may be taken into consideration.[‡] Again, in the case of all covenants to stand seised to uses, a party is at liberty to prove other considerations than those mentioned in the deed.[§] In the case of *Filmer v. Gott*,^b where the considerations mentioned in the deed were £10,000, and natural love and affection, the Lords Commissioners of the Great Seal directed an issue to try whether natural love and affection formed any part of the consideration, the estates being worth £30,000. On appeal to the

[†] *Joynes v. Statham*, 3 Atk. 388. Note, the agreement was executory.

[‡] *Doe d. Small v. Allen*, 8 T. R. 147.

^{*} *Ibid.*

[‡] 3 Atk. 388, *supra*. As where a mortgagee draws the mortgage deed and omits the covenant for redemption. So where there were to be two mortgage deeds, an absolute one and a defeasance, it was held that the mortgagor might prove an agreement to execute the latter; *Ibid.*

[§] *Per* Holroyd, J., in *Doe d. Wellard v. Hawthorn*, 2 B. & Ald. 96. And therefore a lease to trustees may be avoided by a subsequent declaration of trust by some of the trustees; 2 B. & Ald. 96; and see *Doe v. Munro*, 12 M. & W. 845; and as to superstitious uses, *Cary v. Abbott*, 7 Ves. 490.

[¶] *Per* Lord Kenyon, *R. v. Scammonden*, 3 T. R. 475.

^b Cited by Lord Kenyon, 3 T. R. 474; 4 Bro. P. C. 230.

¹ In cases of fraud; *Stark v. Littlepage*, 4 Randolph, 368; *Paysant v. Ware*, 1 Alabama, 160; *Bottomly v. United States*, 1 Story, 135; *Prentiss v. Russ*, 4 Shepley, 30; *Sanford v. Handy*, 23 Wend. 260; *Buck v. Appleton*, 2 Shepley, 284; *Holbrook v. Burt*, 22 Pick. 546; *Bank v. Whinfield*, 24 Wendell, 419; *Singery v. Attorney-General*, 2 Har. & Johns. 487; *Stannard v. McCarty*, 1 Morris, 124; *Jarvis v. Palmer*, 11 Paige, 650; *Renshaw v. Gans*, 7 Barr, 117; *Lowry v. McMillan*, 8 Barr, 157; *Miller v. Cotten*, 5 Georgia, 341.

House of Lords, it was held that the commissioners had done right; and the jury finding that natural love and affection formed no part of the consideration, the deed was afterwards set aside by the Lord Chancellor.

But although a party, in order to prove fraud, may adduce extrinsic evidence to show the inadequacy of the consideration when compared with the value of the estate, the party who claims under the deed cannot, it has been said, be admitted to show a consideration in support of it, different from that which is expressed. Upon a bill to set aside a conveyance of an estate of inheritance worth £40 a year, conveyed to the defendant by an infirm old man of the age of seventy-two, in consideration of an annuity of £20, it was held, that the defendant was not at liberty to show blood and kindred to have been the real consideration of the conveyance,* and to prove that the grantor had often declared that he had rather that his kinsman (one of the defendants) should have the estate for this annuity than any other person for a valuable consideration.^c

In cases also where the public have an interest in the real nature of a transaction between two parties, they are not bound by the representation made in the private agreement, but may impeach it *pro tanto*, as to any misrepresentation; for this misrepresentation may properly be considered as a species of fraud upon the public. Thus, although the private deed of conveyance of an estate expressed £28 to be the purchase-money, it was held, that as between two contending parishes, it was competent to one of them to show that the real consideration was £30, in order to establish a settlement under the statute.^d And, in general, extrinsic evidence is admissible for the purpose of avoiding a particular instrument, on the ground of a fraud attempted to be practised on the revenue;

^c *Clarkson v. Hanway and others*, 2 P. W. 203. But this case seems to be of doubtful authority, and it is quite clear that the party claiming under a deed is not precluded from showing an additional or further consideration not contradictory to that expressed, in order to support it; *Clifford v. Turrell*, 1 Y. & C., N. C. 138; or in order to rebut fraud; *Gale v. Williamson*, 8 M. & W. 405; *Pott v. Todhunter*, 2 Col. C. C. 76.

^d *R. v. Scammonden*, 3 T. R. 473; see also *R. v. Laindon*, 8 T. R. 379; *R. v. Northwingsfield*, 1 B. & Ad. 912; E. C. L. R. 20; and it would seem that third persons, if strangers, might do this; *R. v. Cheadle*, 3 B. & Ad.; E. C. L. R. 23; and see *R. v. Mattingley*, 2 T. R. 12; *Reg. v. Stoke*, 5 Q. B. 303; E. L. C. R. 48.

as by proof that under the particular circumstances the instrument ought to have been differently stamped.^e

Parol evidence is also, in general, admissible for the purpose of showing that an instrument is void on the ground of some illegality committed by the parties; as that it is void for usury, or because it is given to secure a gaming *debt, or founded upon some illegal consideration.^f And where a statute [*675 avoids an instrument which does not fully state the consideration on which it is founded, extrinsic evidence is admissible to show that the directions of the statute have not been complied with.

Oral evidence is also admissible for the purpose of correcting a mistake;^g a practice more frequent in courts of equity than of common law.^h In such cases, especially where recourse is had to equity for relief, the extrinsic evidence is not offered to contradict a valid existing instrument; but to show, that from accident or negligence the instrument in question has never been constituted the actual depository of the intention and meaning of the parties. Thus, where parties covenanted to convey an estate in trust, to raise £30,000 to pay off debts and encumbrances, with

^e *Snaith v. Mingay*, 1 M. & S. 87; *Steadman v. Duhamel*, 1 C. B. 888; E. C. L. R. 50; and on the other hand to show that it did not require a stamp; *R. v. Llangunnor*, 2 B. & Ad. 616; E. C. L. R. 22; and *post*, tit. STAMP.

^f An agreement, varying from the condition of the bond, may be pleaded, to show that the bond was founded on an illegal agreement; *Greville v. Atkins*, 9 B. & C. 462; E. C. L. R. 17; *Paxton v. Popham*, 9 East, 421. So that it has been obtained by duress; see the notes to *Collins v. Blantern*, 1 Smith's L. C. 153; 2 Wils. 341; and *tit. post*, BILLS.

^g A contract, apparently usurious, may be shown to be legal by evidence of a clerical error; *Anon.*, 1 Freem. 253; *Booth v. Cooke*, *ib.* 264.

^h The usual, and certainly the safer course, in case of mistake, is to apply to equity for relief, in the first instance; but parties are not obliged in every case to do so; see *R. v. Wickham*, 2 A. & E. 519; E. C. L. R. 29. But if a mistake has been made in a material part, recourse must be had to equity to reform the instrument; a court of law can only give effect to it as it stands; see *Saunderson v. Piper*, 5 Bing. N. C. 425; E. C. L. R. 35; *Hitchin v. Groom*, 5 C. B. 515; E. C. L. R. 57.

¹ That mistake cannot be shown at law; *Fitzhugh v. Runyon*, 8 Johns. 375; *Bradley v. Anderson*, 5 Verm. 152; *Morton v. Chandler*, 7 Greenleaf, 44; *Lincoln v. Avery*, 1 Fairf. 418; *Coleman v. Crumpler*, 2 Dev. 508. But in equity or where equitable principles are permitted in courts of law it is otherwise; *Christ v. Dffenbach*, 1 Serg. & R. 464; *Gower v. Sterner*, 2 Whart. 75; *Hunt v. Rousmanier*, 8 Wheat. 174; *McMahon v. Spangler*, 4 Rand. 51; *Keisselbrock v. Livingston*, 4 Johns. Ch. Rep. 144; *Coger v. McGee*, 2 Bibb, 321.

remainder over, parol evidence was admitted to show that it was the current intention of all the parties to raise that sum in addition to the sum of £24,000, with which the estate was encumbered.¹

*676] ^aIn cases also of marriage settlements, where mistakes have been committed, and, in consequence, the deeds have varied from the instructions of the parties, they have been rectified by a court of equity.^k The same has also been done in instances of mercantile and other contracts.¹ Where two persons entrust a third to draw up minutes of their intention, a mistake of his may, it has been held, be relieved against.^m Cases of this nature are nearly of kin to those of fraud; it is, in point of conscience and equity, an actual fraud to claim an undue benefit and advantage from a mere mistake, contrary to the real intention of contracting parties. Where a party at the time of executing a deed pointed out a mistake, which the other agreed to rectify, but afterwards refused to do so, parol evidence of the fact was held to be admissible in equity, on the ground of fraud.ⁿ

Such evidence ought not, for obvious reasons, to be allowed to prevail, unless it amount to the *strongest possible proof*.^o The most

¹ *Shelburne v. Inchiquin*, 1 Bro. C. C. 338. The evidence, however, proved to be insufficient, and no more than £30,000 was ordered to be raised. The decree was affirmed in the House of Lords; see also *Baker v. Paine*, 1 Ves. 457; *Towers v. Moore*, 2 Vern. 98; and further in what cases equity will relieve; *London & Birmingham Railway Company v. Winter*, Cr. & P. 57; *Okill v. Whittaker*, 2 Phil. 338.

^k *Barstow v. Kilvington*, 9 Ves. 59; *Randal v. Randal*, 2 P. W. 464; *Marquis of Exeter v. Marchioness of Exeter*, 3 M. & Cr. 321; *Walsh v. Trevannion*, 16 Sim. 178.

¹ See *Henkle v. Royal Exchange Assurance Comp.* 1 Ves. 317; *Thomas v. Frazier*, 3 Ves. jun. 399; 10 Ves. 227; and see *Motteux v. London Assurance Company*, 1 Atk. 545; *Baker v. Paine*, 1 Ves. 456.

^m 1 Bro. C. C. 350.

ⁿ *Per* Lord Thurlow, 1 Bro. C. C. 54; *Pitcairn v. Ogbourne*, 2 Ves. 375.

^o *Per* Lord Hardwicke, in 1 Ves. 318, *supra*. In that case, upon a bill to rectify a mistake in a policy of insurance, the principal evidence consisting in the deposition of an agent of the company, who had transacted business for them, the court held that it was sufficiently certain to be relied on. The Lord Chancellor observed, that the Court of Chancery had jurisdiction to relieve against plain mistakes in contracts in writing, as well as against fraud; so that if reduced into writing, contrary to the intention of the parties, that, on *proper proof*, would be rectified. Lord Eldon, has observed on the looseness of this expression, as it left it to every judge to say, "whether the proof was that *proper proof* which ought to satisfy him."

satisfactory evidence for this purpose consists of the written materials and instructions *which were intended by the parties to be the basis and ground-plan for the construction of the intended instrument.^p [*677]

Where a mistake was alleged to have been made in a settlement by an attorney's clerk, the court would not allow it to be corrected by the mere testimony of the attorney himself, who had received oral instructions for the preparation of the deeds; nothing appearing in the handwriting of the parties to show that a mistake had been committed.^q

In general, where a written document is given in evidence as containing an admission by the adversary, parol evidence is admissible to explain it, or to show that it originated in mistake.^r

The principle on which evidence is received, to explain mistakes in matters of contract between private persons, does not extend to the admission of evidence to show that a mistake or alteration has been made in records; those memorials having been made and kept under the immediate authority of the law, and by officers in whom confidence is for that purpose reposed, it is to be concluded that they have been correctly made, and faithfully preserved.^s *But such evidence is admissible to show a mistake in a memorial not of record; as a court-roll.^t [*678]

^p *Baker v. Paine*, 1 Ves. 457.

^q *Hardwood v. Wallace*, cited 2 Ves. 195. Hence it seems that the court, in such cases, will not rely on mere parol evidence alone; and see the *dictum* of Sir Thomas Clarke to that effect, 1 Dickenson, 295; and see *Shergold v. Boone*, 13 Ves. 373, 376.

^r *Holsten v. Jumpson*, 4 Esp. C. 189; and see *per Buller, J.*, in *Macbeath v. Haldimand*, 1 T. R. 182; and see *Collett v. Lord Keith*, 4 Esp. 212; *Graves v. Key*, 3 B. & Ad. 318; E. C. L. R. 23.

^s *Reed v. Jackson*, 1 East, 355. In *Lord Carnarvon v. Villebois*, 13 M. & W. 213, a judgment in a *quo warranto*, charging a usurpation of free warren over the lands of tenants, as well as over the demesne lands of a manor, upon which, the defendant having set forth a title to the franchise over the demesne lands only, the Attorney-General had confessed the judgment with respect to the title as set forth by the tenant, was held evidence of the title to both as set forth in the information, and the court considered the omission in the plea and judgment as accidental, and a mistake. Amendments in records are frequently made by the courts themselves, on proper application.

^t *Burgess's case*, 1 Leon. 289; *Kite v. Queinton*, 4 Co. 25; *Towers v. Moore*, 2 Vern. 98. In *Hall v. Wiggett*, 2 Vern. 547, an entry in the steward's book, and parol proof by the foreman of the jury of copyholders, was admitted to show that a feme covert had surrendered the whole of her copyhold estate, although the surrender on the roll, and admission, were but of a moiety; and see *Towers v.*

Such extrinsic evidence is also admissible for the purpose of proving fraud. Thus, although a buyer of goods under a written contract cannot show a previous parol contract for the purpose of varying the terms of the written one, he may show by extrinsic evidence that the seller, by some fraud, prevented him from discovering a defect which he knew to exist.⁶

It is obvious that the general exclusive principle is also inapplicable in all cases where the party admits that the deed or other instrument did once legally exist as such, but offers extrinsic proof to show that it has been discharged by some subsequent instrument or agreement,⁷ or by the receiving payment or satisfaction.⁷

II. *In aid of written evidence.*—In the next place, extrinsic parol evidence is admissible generally to *give effect* to a written instrument, by *establishing* its authenticity, *applying* it to its proper subject-matter, and also, as ancillary to the latter object, for the purpose, in some instances, of *explaining* expressions capable of conveying a definite meaning by virtue of that explanation, and of *679] *annexing customary incidents*; and also, in other instances, *for the purpose of removing *presumptions* arising from extrinsic facts which would otherwise obstruct such application.

Where an instrument is not proved by mere production, it must necessarily derive its credit and authenticity from extrinsic evidence.

In the next place, it is always necessarily a matter of extrinsic evidence to *apply* the terms of an instrument to a particular subject-matter, the existence of which is also matter of proof.⁸ A difficulty in this case occurs, where, although the terms of the instrument be sufficiently definite and distinct, the objects to which it is to be applied are not equally so, and where it is doubtful whether the

Moore, 2 Vern. 98; *Walker v. Walker*, Barnard, 215; *Scriven on Copyholds*, *passim*.

⁶ *Kain v. Old*, 2 B. & C. 634; E. C. L. R. 9, citing *Pickering v. Dowson*, 4 Taunt. 779, where it was so laid down by Gibbs, C. J.; and as to fraud, see *Cornfoot v. Fowke*, 6 M. & W. 358; and the numerous cases as to bills, tit. *BILLS OF EXCHANGE*.

⁷ *Supra*, tit. *DEED—ASSUMPSIT*; and *supra*, p. 655, note (c).

⁸ See tit. *ACCORD AND SATISFACTION*.

⁹ In *R. v. Wooldale*, 6 Q. B. 549; E. C. L. R. 51, where an apprentice was described in a deed by one name and executed it by another, extrinsic evidence was held admissible to show that the person meant was the person who executed the indenture; and see *Williams v. Bryant*, 5 M. & W. 447.

description applies at all to the particular object pointed out by the evidence, or whether it be not equally applicable to several distinct objects.

The general rule has already been adverted to, that a *latent ambiguity* (that is, an ambiguity arising from extrinsic evidence) may be removed by extrinsic evidence.

The illustration most usually given of the operation of this rule is that of a description in a will of a devisee, or of an estate, where it turns out that there are two persons, or two estates of the same name and description. Where the testatrix devised an estate to her cousin *John Cluer*, and there were two persons, father and son, of that name, evidence was admitted to show that *John Cluer*, the son, was meant.^a So in *Lord Cheney's case*,^b it was held, that *if [*680 a testator, having two sons of the same name of baptism, and supposing the elder, who had long been absent, to be dead, devise his land to his son generally, the younger son may be permitted to prove the intent of the father to devise to him, and to show that, at the time of the devise, he thought that the other son was dead, or that at the time of making his will, he named his son, *John the younger*, and the writer left out the addition. According to Lord Coke, no inconvenience can result if an averment be taken in such a case, for he who sees the will by which the land is devised cannot be deceived by any secret averment; when he sees the devise to the testator's son generally, he ought, at his peril, to inquire which son the testator intended, which may easily be known by him who wrote the will, and by others who were privy to the intent; and if no direct proof can be made of his intent, then the devise is void for uncertainty.^c So, if a person grant his manor of *S.* generally, and it appear that he has two manors of *S.* (south *S.* and north *S.*) parol evidence is admissible to show which was intended.^d Where the testator gave £100 to the four children of *Mrs. Bamfield* and it appeared that she had four children by *Mr. Bamfield*, her latter husband, and two children by *Mr. P.* her first husband, a declaration by the testator that he had provided for the

^a *Jones v. Newsam*, 1 Bl. 60. Yet if there be father and son of the same name, it is usually to be presumed that the father is meant by the name used simply, and without the addition of "the younger."

^b *Lord Cheney's case*, 5 Co. Rep. 68, b.; so also *Careless v. Careless*, 1 Merivale, 384.

^c 5 Rep. 58.

^d Bac. El. Rule 23; see Broom's Maxims, cap. vi.

four children of *Mrs. B.*, but would give nothing to *P.*'s children, was admitted in evidence to show who were meant by the description of the four children in the will.^e

*681] Where a testator devised a house to *John Gord* the son* of *George Gord*, another to *George Gord* the son of *George Gord*, and a third to *George Gord* the son of *Gord*, evidence of his declarations was admitted to show that he intended that the third house should go to *George Gord* the son of *George Gord*.^f The Court of Exchequer in giving judgment said, "If upon the face of the devise it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual. Such would have been a case of *ambiguitas patens* within the meaning of Lord Bacon's rule, which ambiguity could not be holpen by averment." "But here, on the face of the devise, no such doubt arises. There is no blank before the name of *Gord*, the father, which might have occasioned a doubt whether the devisor had finally fixed on any certain person in his mind; the devisor has clearly selected a particular individual as the devisee. Let us then consider what would have been the case, if there had been no mention in the will of any other *George Gord* the son of a *Gord*: on that supposition there is no doubt upon the authorities, but that evidence of the devisor's intention as proved by his declarations would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were at the date of the will two person, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a latent ambiguity, where one grants his manor of *S.* to *J. T.* and his heirs, and the truth is that he has the manors of south *S.* and north *S.*" In *Doe dem.*, *Hiscocks v. Hiscocks*,^g Lord Abinger, in delivering the judgment of the Court of Exchequer, explained the law in these words: "The object in
*682] all cases is to discover the *intentions of the testator. The first and most obvious mode of doing this is to read his will

^e *Hampshire v. Peirce*, 2 Ves. 216. The correctness of this case, so far as admitting the testator's declaration, is doubted in *Doe v. Hiscocks*, *infra*, p. 681; and note that in the same will, the testator having subsequently given £300 to the children of *Mrs. B.*, Sir John Strange, the Master of the Rolls, held that the declaration was inadmissible as to the £300, being contradictory of the will.

^f *Doe dem. Gord v. Needs*, 2 M. & W. 129.

^g 5 M. & W. 363.

as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names and describes in his will, it is evident that the meaning and the application of his words cannot be ascertained without knowledge of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the time in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances therefore respecting persons and property to which the will relates are undoubtedly legitimate, and often necessary evidence to enable us to understand the meaning and application of the words. Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will. But there is another mode of obtaining the intention of the testator, which is by evidence of his declaration, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words of meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous.

“Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator’s words is *neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons, each answering the words in the will, the testator intended to express. Thus, if a testator devises his manor of *S.* to *A. B.*, and has two manors of north *S.* and south *S.*, it being clear he means to devise one only, whereas both are equally described by the words he has used, in that case there is what Lord Bacon calls an equivocation, *i. e.*, the words equally apply to either manor, and evidence of previous

intention may be received to solve this latent ambiguity, for the intention shows what he meant to do, and when you know that, you immediately perceive that he has done it by the general words he has used, which in their ordinary sense may properly bear that construction. It appears to us, that in all other cases parol evidence of what was the testator's intention ought to be excluded upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."

The reasoning of this case was fully acted upon by the Court of Queen's Bench in *Doe dem. Allen v. Allen*,^h where the devise was to *John A.* the grandson of *T. A.*, charged with the payment of a legacy to each and every of the brothers and sisters of the aforesaid *John*. At the making of the will there were two persons, named *John A.*, grandsons of *T. A.*, one of whom had several brothers and sisters, and the other, one only of each. The court, after determining that the mention of the brothers and sisters was no part of the description of the person, decided that the devisors' declarations were admissible to show that the *John A.*, who had but one brother and one sister, was meant. And the same principle

*684] has been again applied by the Court of Common Pleas in a caseⁱ where the testator devised to his dear wife *Caroline*. He had gone through the ceremony of marriage with *Caroline* and lived with her till his decease, but at the time of his pretended marriage had a wife, *Mary*, who survived him. These facts were admitted to show his intention that *Caroline* was meant. And where lands were devised to *M. B.* for life, remainder to her three daughters, *M.*, *E.* and *A.*, in fee as tenants in common; and *M. B.* had two legitimate daughters named *M.* and *A.*, and one illegitimate named *E.*: extrinsic evidence was admitted to rebut *E.*'s claim, by showing that the testator was ignorant of her birth, and that *B.* formerly had a legitimate daughter named *E.*, and who died long before the date of the will, but of whose death there was no proof that he was aware.^k Evidence of a testator's declarations made before his will was executed, that he intended to provide for *A. P.* in his will, has very recently been held admissible as evidence that such a provision, appearing in an interlineation in the will,

^h 12 A. & E. 451; E. C. L. R. 40. In this case the declarations were made subsequently to the will.

ⁱ *Doe d. Gains v. Rouse*, 5 B. C. 422; E. C. L. R. 57.

^k *Doe v. Beynon*, 12 A. & E. 431; E. C. L. R. 40.

was made before it was executed.¹ So if a man, having two manors of the same name, levy a fine of one, without distinguishing which, parol evidence is admissible to show which was meant.^m

It thus appears that such an ambiguity may be raised by parol evidence;ⁿ and that, in the case of a will, &c., the declarations made by the testator *before, or at, or after the time* of making the will are admissible in order to explain an ambiguity of this nature.

Where the testator devised to his granddaughter *Mary* [*685 **Thomas* of *Llechloyd*, and it appeared that he had a grand-daughter of the name of *Ellenor Evans*, at *Llechloyd*, and a great granddaughter, *Mary Thomas*, who lived elsewhere, evidence on the part of *Ellenor Evans* was admitted to prove that, when the will was read over to the testator, he said that there was a mistake in the name of the woman to whom he intended to give the house, but that there was no occasion to alter it, as the place of abode and the parish would be sufficient.^o But, in the same case, it was held that evidence was properly rejected of declarations made by the testator at *other times* previous to the making of his will, of his great regard for the defendant *Mary Thomas*, and of his intention to give the house to her.^p

As an ambiguity arising from too great generality of description may be removed by oral evidence, which restrains and confines, and applies that description to a single object, although, on the mere comparison of the terms with several objects, they may be equally applicable to more than one; so it is a rule that a redundant and superfluous description, which is inapplicable to an object *well ascertained* by previous or subsequent description, will not prevent such application.

Thus, where property was given to *A. and B.*, legitimate children of *C. D.*, it was held that *A. and B.*, the illegitimate children

¹ *Doe d. Shallcross v. Palmer*, 20 L. J., Q. B. 367. But declarations made afterwards that he had made such provision would not have been evidence for the same purpose; *Ibid.*

^m *Partridge v. Strange*, Plow. 85, b.; *Meres v. Ansell*, 3 Wilson, 275.

ⁿ *Thomas dem. Evans v. Thomas*, 6 T. R. 671; 1 Bro. C. C. 85, 341, 350.

^o *Thomas dem. Evans v. Thomas*, 6 T. R. 671. But this case has been strongly objected to in *Doe v. Hiscocks*, 5 M. & W. 371; and see *Beaumont v. Fell*, *post*, p. 689.

^p *Ibid.*, by Lawrence, J., at the trial: the admission of the evidence was afterwards approved of by the court of K. B.; and see 8 Vin. Ab. 312, pl. 29; 2 Ves. 216.

*686] of *C. D.*, were entitled to take.^a So, if a *grant be made to *William*, Bishop of Norwich, the name of the bishop being *Richard*, the grant will be good, the intention being sufficiently clear and apparent.^a So if a devise be made to *John*, the son of *J. S.*, and *J. S.* has but one son, whose name is *James*.^b

Upon the same principles, if the description in the instrument apply *partially* to each of two persons, but to neither of them entirely, so that a doubt arises which was intended, oral evidence is admissible to remove it. For as an erroneous and superfluous description will not prevent the application of the description which in part is certain, and as a description equally applicable to two objects may be ascertained and fixed by external evidence, it seems to follow, that where the description, although redundant and partially erroneous, is still limited to two or more objects to whom it is equally applicable, then the generality may be further limited by means of extrinsic evidence.^c

It is observable that, in the case of a will, evidence for the purpose of giving effect to the maker's intention has been more liberally admitted than in the case of any other instrument, and in some instances to a greater extent than is strictly warranted by any general principle. It will therefore be proper, in this place, briefly to refer to the general principles and rules which govern *687] this large class *of cases, either in common with others of a similar nature, or as peculiar to the class.*

First, then, evidence of the facts and circumstances in respect of

^a *Standen v. Standen*, 2 Ves. jun. 589; see 2 Pothier, by Sir. D. Evans, 210. Where a woman made a will in favour of a person whom she described to be her husband, and it appeared that he had another wife, Arden, Master of the Rolls, held that the disposition was void; but this was founded not on any defect in the description, but on the principle, that where a legacy is given to a person in a character which he has falsely assumed, and which alone can be supposed to be the motive of the bounty, the law will not permit him to avail himself of it; see *Doe v. Rouse*, 5 C. B. 422, *supra*, p. 684; E. C. L. R. 57. Where the description is true in part, but not true in every particular, parol evidence is admissible, provided there be enough to justify the reception of the evidence; *Miller v. Travers*, 8 Bing. 244; E. C. L. R. 21; see *Careless v. Careless*, 1 Meriv. 384.

^b Evans's Pothier, Vol. II., 209.

^c *Dowsett v. Sweet*, Amb. 175; *Bradwin v. Harper*, Amb. 374; see also *Parsons v. Parsons*, 1 Ves. 166; *Fonnereau v. Poyntz*, 1 Bro. C. C. 472; and see *Doe v. Hubbard*, 15 Q. B. 227; E. C. L. R. 69; and further as to parcels, *post*, p. 691, *et seq.*

^a See the case of *Thomas dem. Evans v. Thomas*, 6 T. R. 671, *supra*, p. 648.

^{*} See tit. WILLS

which the terms of a will are to be applied is necessarily admissible for the purpose of applying them in their strict sense;^y and it is an inveterate rule, founded on plain and obvious principles that where the phrases and terms of the instrument are legal phrases and technical terms, and they are capable of application in their strict, that is, legal and technical, acceptation, they must be applied in that sense, and no other.^z But, secondly, [*688
*where it appears from evidence of the material facts, that

^y That is, where such primary sense is not limited or confined by the rules of legal construction. The great principle is to give effect to the testator's intention in the first place, and within certain limits, by using the words not in their technical sense, but in that which was manifestly intended by the testator; see *Hoyle v. Hamilton*, 4 Ves. 437, and the cases there cited; *Hodgson v. Ambrose*, 1 Dougl. 341; *Doe v. Perratt* 4 B. & C. 79; E. C. L. R. 11; and *Wigram's Examination, &c.*, p. 14, &c. And where the sense is not so limited and confined by the context, although the terms are to be applied in the first instance according to their technical sense and acceptation, yet where they are, upon the evidence, incapable of such application, then, in furtherance of the same principle of effectuating the testator's intention, they may, if capable and within certain limits, be applied in a secondary sense. Where however the sense in which a term is used is determined by the context, or by the testator's own exposition of his meaning, the term can no longer be applied in evidence in a popular sense, for this would be to use his words in a sense different from that intended by the testator.

^z The word *child* may be applied by evidence to an illegitimate child, where an application, according to the strict legal meaning of the word, is of necessity excluded; but if no such necessity exist, the word must be used in its strictly legal sense; *Godfrey v. Davis*, 6 Ves. 43; *Cartwright v. Vaudry*, 5 Ves. 530; *Swain v. Kennerley*, 1 V. & B. 469; *Harris v. Lloyd*, 1 Turn. & R. 310; *Bagley v. Mollard*, 1 Russ. & M. 581; and see *Gill v. Shelley*, 2 Russ. & M. 336; *Wigram's Examination, &c.*, p. 17, 2nd edition; *Miller v. Travers*, 8 Bing. 244; E. C. L. R. 21; tit. WILL. In the case of a devise of "my real estate," property subject to a power was formerly held to pass if the deviser had no real estate; but if there were any real estate on which the words could operate, it was otherwise; *Napier v. Napier*, 1 Sim. 28; *Lewis v. Lewellyn*, 1 Turn. & R. 104; and see *Denn v. Roake*, 5 B. & C. 720; E. C. L. R. 11; *S. C.*, Bing. 475; E. C. L. R. 19; *Davis v. Williams*, 1 Ad. & E. 588; E. C. L. R. 28; *Doe v. Johnson*, 7 M. & G. 1047; E. C. L. R. 49; *Hughes v. Turner*, 3 M. & K. 666; Sugden on Powers, c. vi. s. 46, a, &c. It may be doubted whether this reason and the conclusion drawn from it now apply, since by the 7 Wills Act, Will. IV. & 1 Vict. c. 26, s. 24, such a will operates, with respect to the real as well as to the personal property, as if it had been executed immediately before the death of the testator. And it has always been held that a power over a personal estate will not pass under the words "my personal estate," whether the testator at the time of making the will had any personal estate or not, because the words are applicable to such personal estate as may possibly be afterwards acquired; *Andrews v. Emmett*, 2 Bro. C. C. 297; *Nannock v. Horton*, 7 Ves. 391; *Jones v. Tucker*, 2 Mer. 533;

*689] the terms of a will are incapable of application in their strict acceptation, evidence is admissible to show that they are still capable of application in a popular sense, in order so to apply them. In other words, evidence of material extrinsic facts and circumstances^a is admissible simply in aid of the construction of a will. And, thirdly, it is a general rule that not only material facts, but also declarations made by the testator, are under certain circumstances admissible, when necessary in order to ascertain the person or thing intended, that is, the object of the testator's bounty, or the subject of disposition, where the terms are applicable indifferently to more than one person or thing.^b The authorities go

Wigram's Examination, &c., 3rd ed. p. 18, and the cases there cited. In *Druce v. Denison*, 6 Ves. 385, it was indeed held that, for the specific purpose of raising a case of election, extrinsic evidence was admissible to show that the testator by the words, "my personal estate," meant personal estate subject to a power. This case however, as is observed by Mr. Wigram, p. 39, stands opposed to a strong current of authorities. In further illustration of the general rule above stated, the case of *Doe dem. Richardson v. Watson*, 4 B. & Ad. 787; E. C. L. R. 24, may be cited. The question was, whether two closes of land passed under the word *close*, and it was held that they did not; and Parke, J., observed, "Generally speaking, evidence may be given to show that the testator used the word *close* in the sense which it bore in the country where the property was situate, as denoting a farm, but here such evidence was not admissible, because it is manifest that in this will the testator used the word *close* in its ordinary sense, as denoting an enclosure; for the word *closes* occurs in other parts of the will;" see also *Boys v. Williams*, 3 Sims. 573; *Doe d. Westlake v. Westlake*, 4 Dow. P. C. 65; *Doe v. Bower*, 3 B. & Ad. 453; E. C. L. R. 23; *Doe d. Templeman v. Martin*, 4 B. & Ad. 771; E. C. L. R. 24. Lord Bacon, in his comment on his 13th maxim, *Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*, states the rule thus, "If I have some land wherein all the demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true;" see *Doe v. Ashley*, 10 Q. B. 663; E. C. L. R. 59; *Morrell v. Fisher*, 4 Ex. 591; *Wood v. Rowcliffe*, 6 Ex. 407; *Doe v. Hubbard*, 15 Q. B. 227, *lost*, p. 694; E. C. L. R. 69.

^a It seems to be a general rule that all facts relating to the subject and object of the devise, as to the possession of the testator or other person, the mode of acquisition, local situation, and distribution of the property, are admissible to ascertain the meaning of a will; see the observations of Parke, J., *Doe v. Martin*, 4 B. & Ad. 785; E. C. L. R. 24; *Boys v. Williams*, 2 Russ & M. 689.

^b See note (z); *Wilkinson v. Adams*, 1 V. & B. 422; *Beachcroft v. Beachcroft*, 1 Mad. 436; *Bayley v. Snelham*, 1 Sim. & Stu. 78; *Woodhouslie v. Dalrymple*, 2 Mer. 419; per Lord Hardwicke, in *Goodinge v. Goodinge*, 1 Ves. 231; Lord Thurlow, in *Jeacock v. Falkner*, 1 Bro. C. C. 295; Lord Loughborough, in *Mackell v. Winter*, 3 Ves. 540; Lord Manners, in *Croane v. Odell*, 1 Ball & B. 480; *Colpoys v. Colpoys*, 1 Jac. 451; Lord Eldon, in *Oakden v. Clifden*, Lin-

still further: it has been held that difficulties arising in the application of the terms of a will from defect in the description of the person or thing intended, may be removed by the aid of extrinsic evidence, even although no part of the description be perfectly correct. One of the strongest instances to this effect is the case of *Beaumont v. Fell*.^o A will was made in favour of *Catherine Earnley*, and evidence was allowed to show that *Gertrude Yardley* was the person meant; no such person as *Catherine Earnley* appearing to claim the legacy. Evidence *was admitted to prove that [690 the testator's voice, when he made his will, was very low and scarcely intelligible; that the testator usually called *Gertrude Yardley* by the name of *Gatty*, which the scrivener who made the will might easily mistake for *Katy*; and that the testator referred the scrivener to his wife for the name of the legatee, and she afterwards declared *Gertrude Yardley* was the person intended. But, in the case of *Doe v. Hiscocks*^d before mentioned, the Court of Exchequer, in their elaborate judgment, have considered this case as consistent with true principles only, inasmuch as there was no such person as *Catherine Earnley*, and as *Gertrude Yardley* was usually addressed by the testator by the name of *Gatty*.

Where the testator gave a legacy to *John* and *Benedict*, sons of *John Sweet*, and *John Sweet* the father had two sons only, viz., *James* and *Benedict*, evidence was admitted to prove that the testator used to address *James Sweet* by the name of "*Jackey*."^o Where a legacy was given in moieties, one to *Ann*, the daughter of *Mary Bradwin*, the other to the children of *Mary Bradwin*, another daughter of the first-named *Mary Bradwin*, and it appeared that when the will was made *Ann Bradwin* was dead, having left two children, but that *Mary Bradwin* the daughter was living, and single, the Master of the Rolls held that evidence was admissible to explain the legacy.^f

coln's Inn Hall, 1806; *Lane v. Lord Stanhope*, 6 T. R. 345; *Gibson v. Gell*, 2 B. & C. 680; E. C. L. R. 9; *Pocock v. Bishop of Lincoln*, 3 B. & B. 27; E. C. L. R. 7; *Wilder's case*, 6 Rep. 16; see tit. WILL.

^o 2 P. Wms. 141; see also Lord Thurlow's dictum in *Maybank v. Brooks*, 1 Bro. C. C. 85; and see *Brown v. Langly*, 2 Barn. 118.

^d 5 M. & W. 371, ante, p. 681; and see *Miller v. Travers*, 8 Bing. 244; E. C. L. R. 21.

^e *Dowsett v. Sweet*, Ambl. 175; and see 1 Bro. C. 31, 85; see also *Masters v. Masters*, 1 P. W. 421.

^f *Bradwin v. Harper*, Ambl. 374. Devise to *S. H.*, second son of *T. H.*, when in fact he was the third son, evidence of the state of the testator's family and other

The apparent impossibility of reconciling upon principle the giving effect to a description inapplicable to any subject, with the undisputed law that even in the case of a legacy evidence is inadmissible to fill up a blank,^{*} seems *to induce the necessity
*691] of at once placing the reception of such evidence upon the footing of a peremptory and arbitrary exception to general rules and principles, and to exclude all attempts at reconciliation. In the case of a blank, the effect of the evidence might simply be to supply a name mentioned by the testator: in the case of a total misdescription, evidence is necessary not simply to *supply* but to *substitute* a description. It seems to be very questionable whether Lord Bacon's rule as to ambiguities, be applicable to the case not of a double meaning, but to simple deficiency of description.^h

In general, where there is any doubt as to the extent of the subject devised by will, or demised, or sold, it is matter of extrinsic evidence to show what is included under the description as parcel
*692] of it.ⁱ The question being *whether a description in a lease (*inter alia*) of a piece of ground, late in the occupa-

circumstances was admitted to show the mistake in the name; *Doe v. Huthwaite*, 3 B. & Ald. 632; E. C. L. R. 5.

^{*} In *Beaumont v. Fell*, *supra*, the Master of the Rolls, although he admitted the evidence, said, "If this had been a grant, nay, had it been a devise of land, it had been void by reason of the mistake both of the christian and surname;" and see *Doe v. Hiscocks*.

^h See Wigram's Examination, &c. 179.

ⁱ *Doe v. Burt*, 1 T. R. 701. Buller, J., said, whether parcel or not of the thing demised, is always matter of evidence; see *Kerslake v. White*, 2 Starke, 508; E. C. L. R. 3; where it was held, that the demise of a messuage, with all rooms and chambers thereto belonging and appertaining, included all that was occupied together as the entire messuage at one and the same time, and that the demise did not include a room which had once formed part of the messuage, but which had been separated from it for many years anterior to the demise; *Herbert v. Reid*, 16 Ves. 481. In *Doe d. Beach v. Earl of Jersey*, 3 B. & C. 870; E. C. L. R. 10; under a devise by the testator of all his Briton Ferry estate, it was held, that accounts of deceased stewards of former owners, in which they charged themselves with the receipt of various sums of money on account of the owners, were admissible in evidence to show that particular lands had gone by the name of the Briton Ferry estate; see *Goodtitle v. Southern*, *infra*. So in the case of a written agreement to convey all those brickworks in the possession of A. B., parol evidence is admissible of what passed at the time of the agreement, to show what was intended to pass; *Paddock v. Fradley*, 1 C. & J. 90. Where a fine was levied of twelve messuages in Chelsea, and it appeared that the cognisor had more than twelve messuages in Chelsea, parol evidence was admitted to show which were meant; *Doe v. Wilford*, R. & M. 88; E. C. L. R. 21. There being a devise

tion of *A.* (the piece of ground being a yard, then in the occupation of *A.*), a cellar and certain wine-vaults under it, passed, evidence was admitted to prove, that at the time of the lease the cellar and vaults were not in the occupation of *A.* but were under lease to *B.* another tenant of the lessor, and that the defendant never claimed them until the expiration of *B.*'s lease. But where a subject-matter exists, which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity; and no evidence can be admitted for the purpose of applying the terms to a different object.^j In the case of *Doe d. Sir A. Chichester v. Oxenden*,^k the question was, whether parol evidence could be admitted to show that the testator, by a devise of his estate at *Ashton*, intended to devise all his maternal estate, consisting of two manors in the parish of *Ashton*, and one in the adjoining parish; the court, after hearing two arguments, decided against the evidence. [*693 Sir J. Mansfield, C. J., in giving judgment, referred to the cases of *Beaumont v. Fell*,ⁱ and *Dowset v. Sweet*;^m and distinguished

of *Troques Farm*, in the occupation of *M.*, it may be shown that *M.* was not tenant; *Goodtitle v. Southern*, 1 M. & S. 297; *Doe v. Galloway*, 5 B. & Ad. 43; E. C. L. R. 27; *Jack v. McIntyre*, 12 Cl. & F. 151. Where a deed granted all the coal mines in the lands in the occupation of widow *K.* and son, and the grantor had not any lands in the occupation of widow *K.* and son, and the deed was founded upon a contract of sale to which the grantor's land steward was the subscribing witness; held that, to explain the latent ambiguity in the deed, letters written by the latter to the grantees respecting the sale of the coal mines, and purporting to be written by his directions, were admissible, without showing an express authority from the grantor to write them; *Beaumont v. Field*, 1 B. & Ald. 247; but see *Doe v. Webster*, 12 A. & E. 442; E. C. L. R. 40; *Williams v. Morgan*, 15 Q. B. 782; E. C. E. R. 69.

^j *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138; *Carruthors v. Sheddon*, 6 Taunt. 14; E. C. L. R. 1; *Doe v. Ashley*, 10 Q. B. 663; E. C. L. R. 59; *Morrell v. Fisher*, 4 Ex. 591; *Wood v. Rowcliffe*, 6 Ex. 407, ante, p. 688, note (z). So where words have acquired a precise and technical meaning; *Ib.*; per Lord Kenyon, 6 T. R. 352; *Mountain v. Blaimire*, 4 Russ. 384. And although the mere name of a devisee in a will be applicable to several, parol evidence of application is not admissible, if it can be collected from the will who was intended; *Doe v. Westlake*, 4 B. & Ald. 57; E. C. L. R. 6.

^k 3 Taunt. 147; 4 Dow. 65.

^l 2 P. Wms. 140; also to *Whitbread v. May*, 2 Bos. & Pull. 593, where the question was as to the effect of a codicil, by which the testator revoked a former general devise of all his estates, so far as it related to his estate at *Leeshill* in the county of Wilts, and *Hearne*, and *Buckband* in the county of Kent. The testator had lands in *Hearne* and several other parishes, all of which he had purchased

^m Amb. 175; *supra*, p. 689.

the present case, on the ground that in those *the will would have had no operation unless the evidence had been received*; whereas in the present the will would have an *effective operation to pass all the estate within the parish of Ashton*, without the evidence proposed; that in the other cases the evidence was admitted to explain that which otherwise would have had no operation, and that it was safer not to go beyond that line. The same question was afterwards brought before the House of Lords,^a *where judgment was given corresponding with that of the Court of Common Pleas.

And where a testator “devised “all those two cottages or the tenements, the one occupied by my son *John Hubbard*, the other occupied by my granddaughter,” and the property originally consisted of two copyhold cottages, of which part only of one was occupied by *John Hubbard* and part only of the other by the granddaughter, and both of these parts had been separated by partition

by one contract from one person; evidence was offered to show that the testator meant to revoke the devise, not only as to the lands in *Hearne*, but also as to all the lands purchased at the same time; the evidence was received at the trial, subject to the opinion of the Court of C. B., which was equally divided upon the question; see *Doe d. Brown v. Brown*, 11 East. 441; *Doe v. Lyford*, 4 M. & S. 550.

^a *Doe d. Oxenden v. Sir A. Chichester*,⁴ Dow. 65, in an action brought by the devisee against the heir at law. The question on the admissibility of the evidence having been referred to the Judges, Sir V. Gibbs, C. J. of C. P., delivered their unanimous opinion, that the evidence ought not to be admitted. In delivering that opinion, he observed, “The courts of law have been jealous of extrinsic evidence to explain the intention of a testator, and I know of only one case in which it is permitted; that is, where an ambiguity is introduced by extrinsic circumstances. There, from the necessity of the case, extrinsic evidence is admitted to explain the ambiguity. For example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence must be admitted to show which of the Blackacres is meant. So if one devises to his son John Thomas, and he has two sons of that name. So if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show which nephew the testator meant, by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance; and the admission of evidence to explain the ambiguity is necessary to give effect to the will; and it is only in such a case that extrinsic evidence can be received. It is of great importance that the admission of extrinsic evidence should be avoided, where it can be done, that a purchaser or heir at law may be able to judge from the instrument itself what lands are, or are, not to be affected by it. Here the devise is of all the devisor's estate at Ashton, for there is no difference between the words ‘Estate of Ashton,’ and ‘Estate at Ashton,’ and he has an estate at Ashton which satisfies the description.” See *Doe v. Morgan*, 1 C. & M. 235.

from the rest, which was occupied by other persons including the testator, and both parts had separate outer doors, the Court of Queen's Bench was divided whether the directions given by the testator to the person who drew his will, indicating that he spoke of his copyhold premises by the description in the will, were admissible.^o

But neither a new subject-matter of devise, nor a new devisee, where the will is intent upon either, can be imported by parol evidence to a will. Thus, in *Miller v. Travers*.^p where a testator devised all his real estates in the County of Limerick, and in the City of Limerick, but in fact he had no estates in the former, and only a small one in the latter inadequate to meet the charges in the will, but he had large estates in the County of Clare, which were not mentioned in the will, the devisee was not allowed to prove by parol evidence that the testator's intention *was to devise the es- [*695 tates in Clare by showing that those estates were devised to him in the draft of the will; that this was sent to a conveyancer to make some alteration as to other parts of the will, and he had by mistake erased the words, "County of Clare," which mistake had not been adverted to by the deviser when he executed the will.

In the next place, extrinsic evidence is admissible for the purpose of construing ancient charters, explaining the meaning of the terms of contracts, to which a peculiar and technical sense has been annexed, by custom and usage. Also for the purpose of showing the consequences and incidents, which, by virtue of a known and established custom, are by presumption of law appurtenant to the general terms of a contract.

In *ancient charters* words are often to be found of doubtful import from their antiquity; the particular terms may have become obscure, or even obsolete; but it would be highly unreasonable, as well as inconvenient, that on this account the whole should perish; the terms were probably understood when the instrument was made; and it is also probable that the usage and practice then conformed, and that they have since continued to conform, with the real meaning and sense of those expressions; and hence such ancient and continuing usage may with reason and prudence be resorted to as the expositors of such doubtful terms^q and phrases;

^o *Doe v. Hubbard*, 15 Q. B. 227; E. C. L. R. 69.

^p 8 Bing. 244; E. C. L. R. 21.

^q In *The Attorney-General v. Parker*, 3 Atk. 576, Lord Hardwick observed, that in the construction of ancient grants and deeds there is no better way of con-

*696] more especially where the charter *concerns the public interests of a large body, who would not, it may be presumed, have acquiesced in an illegal interpretation and application of its terms. Such evidence may be considered as somewhat analogous to the practice of the courts, in considering the usage supplied by the precedents as to the construction of a doubtful statute, except that the courts themselves notice the contemporaneous and subsequent construction put upon the statute;^r but in the case of a charter, the usage, if not admitted, must be ascertained as a fact by a jury.

Such evidence in aid of the construction of a doubtful charter is also founded in part upon considerations of legal policy and convenience, for the purpose of quieting litigation, and supporting long-continued and established usages.^s In the case of *Withnell v. Gartham*,^t Lawrence, J., observed, "If there be any ambiguity in this *697] *deed, usage is admissible to explain it; and the argument of convenience or inconvenience from this or that construct-

struing them than by usage, and *contemporanea expositio est optima*. In *R. v. Varlo*, Cowp. 248, Lord Mansfield observed, "Supposing the terms of the charter doubtful, the usage is of great force; not that usage can overturn the clear words of a charter; but if they are doubtful, the usage under the charter will tend to explain the meaning of them." Lord Coke in his comment on the Stat. of Gloucester, 2 Inst. 282, observes, "ancient charters, whether they be before the time of memory or after, ought to be construed as the law was when the charter was made, and according to ancient allowance; and again, "when any claimed, before the justices in eyre, any franchises by an ancient charter, though it had express words for the franchises claimed, or if the words were general, and a continual possession pleaded of the franchises claimed, as if the claim was by old and obscure words, and the party in pleading, expounding them to the court, and averring continual possession according to that exposition, the entry was ever, '*Inquiratur super possessionem et usum*,' &c., which I have observed in divers records of those eyres, agreeable to that old rule, '*Optimus interpres rerum usus*.'" However general the words of ancient deeds may be, they are to be construed, as Lord Coke says, by evidence of the manner in which they have been possessed and used; *per* Lord Ellenborough, in *Weld v. Hornby*, 7 East, 199. Long user may serve to explain an ambiguous Act of Parliament; *Stewart v. Lawton*, 1 Bing. 377; E. C. L. R. 8. To explain what is meant by "tithes" in a crown grant, contemporaneous leases and other extrinsic evidence and testimony are admissible to show the kind of tithes intended to be conveyed; *Linton School v. Scarlett*, 2 Y. & J. 330; and see *Doe v. Bevis*, 7 C. & B. 456; E. C. L. R. 62.

^r See *R. v. Hogg*, 1 T. R. 728.

^s See the observations of Buller, J., *Blankley v. Winstanley*, 3 T. R. 228.

^t 6 T. R. 388. Where the nomination of a curate was, by a deed of 1656, given to the "inhabitants," it was held that the word was properly explained by past usage to mean "all housekeepers."

tion of a deed creates that sort of ambiguity that should be explained by usage."

In the case of *The King v. Osbourne*," by the terms of the charter the power of electing aldermen was committed to the mayor and *commonalty*. According to the *usage*, the term *commonalty* included aldermen; and the court were of that opinion and construed the charter accordingly.^x Usage was, on the same principle, admitted as explanatory evidence as to the mode of presentation, where a presentation to a curacy had been given by deed ninety years before to the *parishioners* and *inhabitants* of Clerkenwell.^y Also, in order to show that an act, which by the terms of a charter was committed to the mayor, aldermen and burgesses, or the greater part of them, was well executed by the majority present at a regular meeting, although not by a majority of the whole number;^z that a presentation given by a charter to the mayor, aldermen and burgesses, was properly executed by the mayor and aldermen only;^a that the justices of a county have a concurrent jurisdiction with the justices of a borough,^b under the particular *charter. [*698 Again, where the power of appointing a schoolmaster was given to the minister and churchwardens, to show that an appoint-

^x 4 East, 327.

^y Lord Ellenborough said, that without resorting to any assistance from contemporaneous and subsequently continuing usage (to which, however, in such cases, upon the best authorities in the law, resort may allowable be had), on the face of the charter itself, by a fair construction of it, *commonalty* does include aldermen.

^z *Attorney-General v. Parker*, 3 Atk. 576; *Attorney-General Foster*, 10 Ves. 335; *R. v. Davies*, 6 Ad. & E. 374; E. C. L. R. 33.

^a *R. v. Varlo*, Cowp. 248. But as to the *decision* in this case, *vide infra*, p. 699, note (f). See also *R. v. Osbourne*, 4 East, 327; *Bailiffs of Tewkesbury*, v. *Bricknell*, 2 Taunt. 120; *R. v. Mayor of Chester*, 1 M. & S. 101; *Chad v. Tilsed*, 2 B. & B. 409; E. C. L. R. 6; *R. v. Mayor, &c., of Stratford-upon-Avon*, 14 East, 348; *Mayor of London, &c., v. Long*, 1 Camp. 22; *Weld v. Hornby*, 7 East, 199; see also *R. v. Mayor of St. Alban's*, 12 East, 559.

^b *Gape v. Handley*, 3 T. R. 288, n.

^c *Blankley v. Winstanley*, 3 T. R. 279. Note, Buller, J., observed, that "Usage consistent with the charter has prevailed for one hundred and ninety years past; and if the words of the charter were more disputable than they are, I think that ought to govern the case. There are cases in which the court has held that settled usage would go a great way to control the words of a charter; and it is for the sake of quieting corporations that this court has always upheld long usage, where it was possible, though recent usage would perhaps not have much weight." And see *per Patteson, J.*, *R. v. Atwood*, 4 B. & Ad. 507; E. C. L. R. 24.

ment by the minister and a majority of the churchwardens is good.^c And a charter of Richard II., empowering the Merchant Tailors' Company to elect a master and warden *de scriptis*, but not prescribing the mode, was considered to be properly construed in that respect by the usage.^d

It is not essential to the admissibility of evidence of usage that the instances proved should be as ancient as the deed; a custom from time of legal memory is frequently established by evidence of facts done at a much later period.^e

Where, however, the terms of an ancient charter are not in themselves doubtful, either from the use of equivocal and obscure terms, or in point of legal construction, evidence of usage can no longer avail; its legitimate object is to remove doubts; its functions therefore cease where no doubt exists; and to admit it in such a case would be not to obviate, but to create doubts. Where a statute constituted a body of forty-eight, with power, in conjunction with certain others, to do corporate acts in the town Northampton, it was held that an usage of three hundred years' continuance was unavailable to show that the attendance of a majority of forty-eight *699] was not requisite, the general question having been *already settled, that where such powers are delegated to a definite body, the attendance of a majority of that body is essential.^f

To decide whether the construction of a charter be so doubtful as to admit of explanation from usage, or whether, on the other hand, the terms be so intelligible in their usual plain and ordinary sense, or by any necessary construction of law, with reference to antecedent decisions, is obviously a pure question of law.^g The ambiguity, to require such aid, must clearly be such as arises upon

^c *Withnell v. Gartham*, 6 T. R. 388.

^d *R. v. Atwood*, 4 B. & Ad. 481; E. C. L. R. 24.

^e See Lord Kenyon's observations in *Withnell v. Gartham*, 6 T. R. 388; where the question was upon the construction of an ancient deed, granting to the minister and churchwardens of a parish the power of appointing a schoolmaster.

^f *R. v. Miller*, 6 T. R. 268; and see *R. v. Bellringer*, 4 T. R. 810. There the charter of Bodmin gave power to a definite body, which was exercised by a majority of the subsisting body, but not by a majority of the definite number. Usage was adduced to show that a majority of the definite number was essential; but the court declined to decide upon the validity of the use alleged, being of opinion, upon the construction of the charter, and without reference to usage, that a majority of the whole definite body was requisite; see *Bailiffs of Godmanchester v. Phillips*, 4 A. & E. 550; E. C. L. R. 31.

^g See the observations of Sir D. Evans on this head, 2 Evans's Pothier, 213, *et sequent.*

reading the instrument itself, independent of any extrinsic considerations; and unless a doubt arises from that source, usage can avail nothing; for if it be consistent with the legal construction of the deed, it is unimportant; if it be contrary to such construction, to admit it would be, not to explain, but to subvert, an authentic instrument by the aid of presumption and opinion. In the case of *Stammer v. Dixon*,^h where the ancient admissions of the copyholders were to land by the description of *tres acras prati*, it was held that evidence was admissible to show, from acts of enjoyment, that the admission must be construed to mean *prima tonsura* only. Even in the case of a statute, universal usage has sometimes been resorted to for the purpose of explaining doubtful terms.ⁱ And in the case of *Withnell v. Gartham*,^{*k} it was held that evidence of usage was as much admissible to construe a deed made by the founder of a school, though a private person, as in the case of the King's charter. [*700]

The doctrine of applying evidence of contemporaneous usage to the construction of ancient deeds, has, it appears, been applied to merely *private* as well as to *public* instruments;¹ but it is obvious that the reasons for allowing it in the former case apply with much less force, inasmuch as the mere assent and acquiescence of a private person, who may have been ignorant of his rights, affords a presumption very inferior in weight to that which is to be derived

^h 7 East, 200; *Lord Petre v. Blencoe*, 4 Gwill. 1484; see *per* Wilde, C. J., *Cox v. Glue*, 5 C. B. 548; *Doe v. Beviss*, 7 C. B. 483; E. C. L. R. 62.

ⁱ *Sheppard v. Gosnold*, Vaugh. 169; *R. v. Scott*, 3 T. R. 604; *Corporation of Dunbar v. Duchess of Roxburgh*, 3 Cl. & F. 335. But, in general, evidence is not admissible to explain the meaning of a statute, as to show what is meant by the word *square* according to the technical usage of the trade; *The Attorney-General v. The Plate Glass Co.*, 1 Anst. 39. Where a contract is for so many bushels of corn, statutory bushels must be intended; *Hockin v. Cooke*, 4 T. R. 314.

^k 6 T. R. 388. Lord Kenyon observed, that if there were any difference, it would be in favour of the admissibility in the case of a private deed, for the King's grants are not construed strongly against the grantor, as private deeds are.

¹ In the case of *Cooke v. Booth*, Cowp. 819, the doctrine was extended to a subject of a nature merely private. A lease contained a covenant of renewal; the question was, whether by the terms of the covenant each subsequent lease was to contain a similar covenant; and as there had been several successive renewals, with similar covenants, the court held that the parties by their practice had put their own construction on the covenant, and were bound by it. Where the terms of an award are ambiguous in relation to a road, subsequent usage is admissible in explanation of its meaning; *Wadley v. Bayliss*, 5 Taunt. 752; E. C. L. R. 1.

from the long-established practice and usage of a public body. The application of this principle to the case of private instruments has, however, been denied in two instances^m in equity, and it seems *701] to be very doubtful *whether such evidence would not be received in a court of law.

Where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties in framing their contract had made use of a foreign language, which courts are not bound to understand. Such an instrument is not on that account void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the courts have long allowed mercantile instruments to be expounded according to the usage and custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters.ⁿ

^m *Bayham v. Guy's Hospital*, 3 Ves. 298; 6 Ves. 237. In the case of *Iggulden v. May*, in error, 2 N. R. 449, Mansfield, C. J., in giving judgment, observed upon the case of *Cooke v. Booth*, "We think that was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of that deed;" *S. C.* 7 East, 237. In *Hughes v. Gordon*, 1 Bli. 289, it was said that evidence to explain a deed was highly dangerous, except in cases of fraud or misrepresentation; and see *Clifton v. Walmesley*, 5 T. R. 564; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Stammers v. Dixon*, 7 East, 200.

ⁿ A jury may properly judge of the meaning of mercantile phrases in the letters of merchants; *Lucas v. Groning*, 7 Taunt. 164; E. C. L. R. 2; *Mallan v. May*, 13 M. & W. 511. Hence witnesses may be called to show that a particular expression in a commercial contract is understood in the mercantile world, in a different sense from its ordinary import; *Chaurand and another v. Angerstein*, Peake, C. 43. Or that a particular meaning was affixed to a word of indeterminate signification (privilege), in a previous conversation between the parties; *Birch and another v. Depeyster*, 4 Camp. C. 385; 1 Stark. C. 210, *S. C.*; E. C. L. R. 2; and see *Iggulden v. May*, 7 East, 237; 9 Ves. 325; 2 N. R. 449, *S. C.* A bill of lading contains a memorandum, "to be discharged in fourteen days," or pay five guineas a day demurrage; evidence of usage may be adduced to show that *working* days, and not *running* days, are meant; *Cochran v. Retberg*, 3 Esp. C. 121. Parol evidence may likewise be given, to show that in a particular place, trade, or business, *e. g.* that of an auctioneer, the term "month" means calendar, and not lunar month; *Simpson v. Margitson*, 11 Q. B. 23; E. C. L. R. 63. So, to show that in the theatrical world, an engagement for three years means three seasons; *Grant v. Maddox*, 15 M. & W. 737. So, to show that in matters connected with rabbit warrens in a

*Thus a general warranty in a policy of insurance to depart with convoy, may be proved, according to mercantile *usage and understanding, to be satisfied by a joining of convoy at the nearest usual place of rendezvous.*

certain district, a thousand rabbits means twelve hundred; *Smith v. Wilson*, 3 B. & Ad. 728; E. C. L. R. 23. By a charter, a vessel with a cargo of coals to Algiers was to be unloaded at a certain rate per day, and if detained longer the charterer was to pay so much per day from the time of the vessel being ready to unload, and *in turn to deliver*. Evidence to show that in the port of Algiers these words had acquired a particular meaning was held admissible; *Robertson v. Jackson*, 2 C. B. 412; E. C. L. R. 52. So to show what is the meaning in a bill of lading of a delivery "in London;" *Bourne v. Gatliffe*, 3 M. & G. 643; E. C. L. R. 42. And where timber was sold warranted "sound," and the issue was whether it was sound, evidence was admitted to show that in the timber trade the word sound had a technical meaning, and did not import absolute freedom from defects; *Woodhouse v. Swift*, 7 C. & P. 310; E. C. L. R. 32. Evidence of a communication to the insurer is admissible to define what otherwise is indefinite; *Urquhart v. Barnard*, 1 Taunt. 450; but in general, in the construction of an agreement or deed, the conduct or correspondence of the parties cannot be taken into consideration; see *Simpson v. Margitson*, 11 Q. B. 23; E. C. L. R.; Sugden's Concise View of the Law of Vendors and Purchasers, p. 116. Where an entry made by a clerk since deceased is ambiguous, a person conversant with the mode in the office in which the business was conducted may be called to explain a particular item; *Hood v. Reeve*, 3 C. & P. 532; E. C. L. R. 14. In trover for good sent by the plaintiff to the defendant, a packer, and expressed in the receipt to have been received on account of the plaintiff for *M.*, the party to whom they had been sold; it was held, that evidence of the usage of trade was admissible to explain the meaning of ambiguous terms in such receipt; *Bowman v. Horsey*, 2 M. & Rob. 85; see *Syers v. Bridge*, Doug. 527; *Edie v. East India Company*, 2 Burr. 1216; 1 Ves. 459. But evidence that "last" imported foreign, not English measure, was held inadmissible; *Moller v. Living*, 4 Taunt. 102; and see *Hockin v. Cooke*, 4 T. R. 314. And Cresswell, J., refused to admit evidence of what was meant by "building" in a contract for building cottages; *Charlton v. Gibson*, 1 C. & K. 541; E. C. L. R. 47; see *Shore v. Wilson*, 9 Cl. & F. 499. So evidence to show that cargo and freight apply to passengers as well as goods has been rejected as inadmissible; *Lewis v. Marshall*, 7 M. & G. 729; E. C. L. R. 49; or that a contract to sell Ware potatoes meant a particular sort of Ware potatoes; *Smith v. Jeffreys*, 15 M. & W. 561.

* *Lethullier's case*, 2 Salk. 443. In *Lilly v. Ewer*, Dougl. 72, evidence of merchants was received upon the question whether "sailing with convoy" meant for the whole voyage or not. In *Robertson v. French*, 4 East, 130, Lord Ellenborough observed, that the same rules which applied to all other instruments applied also to a policy of insurance, that is, to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which are to be understood in their plain, ordinary and popular sense, unless they have generally in respect of the subject, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the word; *Salvador v. Hopkins*, 3 Burr. 1707.

So where, upon the sale of a cargo, the vendor covenanted to pay all duties, *allowances*, &c., to be taken out of them, he was permitted to adduce proof of a custom, to show that such allowances were to be limited^p to the price which he should receive.

Where it was stipulated in a charter-party that the captain should receive a stipulated sum in lieu of *privilege* and *primage*, and the question was, whether the terms of the contract excluded all right on the part of the captain to use the cabin for the carriage of goods on his own account, Gibbs, C. J., said, evidence may be received to show the sense in which the mercantile part of the nation use the term *privilege*, just as you would look into a dictionary to ascertain the meaning of a word; and it must be taken to have been used by the parties in its mercantile and established sense.^q

*704] *In the case of *Cutte v. Powell*, where a promissory note was given to a sailor, to be paid provided he served on board the ship as second mate during the voyage, and he died before the completion of the voyage, the court, deciding upon the terms of the contract, held that his administrator was not entitled to recover *pro ratâ* for the time during which he served; but it appears from the language of the court in that case, that if a custom could have been established that such notes were in general use, and that the commercial world would have acted upon them in a different sense, they would have decided differently.^r

It is to be observed, that it has been questioned by the highest authorities, whether the practice of construing mercantile documents by usage has not been carried too far.

In the case of *Anderson v. Pitcher*,^s Lord Eldon observed, "It is

^p *Baker v. Paine*, 1 Ves. 459; *Ibid.* 317; see 6 Ves. 336, n.; *Ekins v. Macklish*, Amb. 186; *Ford v. Hopkins*, Salk. 283; *Henkle v. Royal Exchange Assurance Company*, 1 Ves. 318; *Thomas v. Fraser*, 3 Ves. jun. 399; 10 Ves. 227.

^q *Birch v. Depeyster*, 1 Stark. C. 210; E. C. L. R. 2. And note, that in that case the same learned Judge admitted evidence of a conversation between the parties, to show in what sense they used the term. He said, he thought such evidence fell within the general current of mercantile understanding; since, if the term had been used in different trades in different ways, the conversation was evidence to show in what sense it was used on that occasion. So evidence has been admitted for the purpose of showing the understanding of mariners in geographical matters; as to show that the Mauritius is considered to be an East India Island; *Robertson v. Money*, R. & M. 75; E. C. L. R. 21; and the Gulf of Finland a part of the Baltic Sea; *Uhde v. Walters*, 3 Camp. 16.

^r *Cutter v. Powell*, 6 T. R. 320.

^s 2 B. & P. 164. The question in that case was as to the meaning of a war-

now too late to say that this warranty (in a policy of insurance) is not to be expounded with due regard to the usage of free trade; perhaps it is to be lamented that in policies of insurance parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great judge, Lord Holt.^b It is true, indeed, that Lord Mansfield, who may be considered the establisher, if not the author, of great part of this law, expressed himself thus, 'whenever *you render additional words necessary, and multiply them,' you also [*705 multiply doubts and criticisms.' Whether, however, it be not true, that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned."

The legitimate object of extrinsic evidence, in such cases, seems to be to explain terms which are not intelligible to all who may understand the language, but which may nevertheless have acquired, by custom and usage, a known definite sense and meaning amongst a particular class of persons, which can be well ascertained by means of the testimony of those who are conversant with the peculiar use of those terms. The witnesses for this purpose may be considered to be the sworn interpreters of the mercantile language in which the contract is written.* Beyond

ranty (contained in a policy) to depart with convoy; and it was held that it is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence they can be obtained. So in the case of a bill of lading, &c., evidence was admitted to show what was meant by "days;" *Cochran v. Retberg*, 3 Eps. C. 121.

^a *Lethullier's case*, 1 Salk. 443.

^b *Lilly v. Ewer*, Doug. 72.

* Within this principle numerous cases have occurred, of which the following may be cited in addition to those already referred to. Parol evidence has been held admissible to show the meaning of the word "level" in a lease of coal mines; *Clayton v. Gregson*, 5 Ad. & E. 302; E. C. L. R. 31; in the provision trade, of "mess pork of S. & Co.;" *Powell v. Horton*, 2 Bing. N. C. 668; E. C. L. R. 29; to show that, in the hop trade, "at 100s.," in a sold note in these words, "sold M. W. 18 pockets of Kent hops, at 100s.," meant 100s. per cwt. and not per pocket; *Spicer v. Cooper*, 1 Q. B. 424; E. C. L. R. 41; that the word London has a colloquial sense other than that of the City; *Mallan v. May*, 13 M. & W. 511; that, in the corn trade, "good barley" means a different quality from "fine" barley; *Hutchison v. Bowker*, 5 M. & W. 535; see *Robertson v. Jackson*, 2 C. B. 412, *supra*; E. C. L. R. 52; that amongst sporting persons a race "across a country" means straight without deviating through open gates; *Evans v. Pratt*, 3 M. & G. 759; E. C. L. R. 42; that a bale of cotton may mean a bag in the Alexandria trade, although it means a compressed bale in the Levant trade; *Taylor v.*

*706] this, however, *the *principle* does not extend; merchants are not prohibited from annexing what weight and value they please to words and tokens of their own peculiar coinage, as may best suit their own purposes, but they ought not to be permitted to alter and corrupt the sterling language of the realm. If they use plain and ordinary terms and expressions, to which an unequivocal meaning belongs, which is intelligible to all, then, it seems, that according to the great principle so frequently adverted to, that plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage. It is clear, indeed, that if a contrary practice were to prevail, and be carried to its full extent, the effect would nearly be to render it impossible to make a special contract in mercantile affairs, and to compel all persons, under all circumstances, to conform to the usages of trade; the written contract would become a dead letter; the question would not be, what is the actual contract, but what is the usage; and the very same terms would denote different contracts as often as mercantile fashions varied. In short, the *jus et norma loquendi*, in a legal sense, would become wholly dependent on the usages of trade.⁷ Thus parol evidence is inadmissible to explain the meaning of the words "more or less" in a mercantile contract;² and in unusual contracts evidence that words or phrases have a peculiar meaning is not admissible.*^a

*707] So, where a man contracts in his own name, evidence to excuse him from liability, on

Briggs, 2 C. & P. 525; E. C. L. R. 12. So, upon a contract to pay at so much per ton for goods shipped at Bombay, cotton to be calculated at fifty cubic feet per ton, evidence may be given of a usage to pay according to the measurement at Bombay; *Bottomley v. Forbes*, 5 Bing. N. C. 121; E. C. L. R. 35. In like manner, parties have been permitted to reconcile apparent variances in bought and sold notes by the testimony of brokers; *Bold v. Rayner*, 1 M. & W. 343. Where the captain of a ship had agreed to convey a boat for the plaintiff of stated dimensions, evidence was admitted of the practice to remove the decks of such boats when put on board; *Haynes v. Holliday*, 7 Bing. 587; E. C. L. R. 20; and see *Hood v. Reeve*, 3 C. & P. 532, E. C. L. R. 14. In *Chaurand v. Angerstein*, Peake's C. 43, where it had been represented to an insurer that the ship would sail from St. Domingo in October, he was permitted to show in his defence that this was understood among the merchants to mean between the 25th and the end of October; and see other instances, *ante*, p. 701, note (n), and p. 653. The admission of such evidence seems, however, to have been carried further than either principle or convenience warrants.

⁷ See *Anderson v. Pitcher*, 2 B. & P. 168.

² *Cross v. Eglin*, 2 B. & Ad. 106; E. C. L. R. 22.

^a *Lewis v. Marshall*, 7 M. & G. 729; E. C. L. R. 49.

the ground of a custom of trade in Liverpool to send in brokers' notes without disclosing the principal's name, was rejected; and Alderson, B., said, "the custom offered to be proved is a custom to violate the common law of England."^b Where a merchant carried on business as a tallow merchant abroad, through an agent who always used his own name but was universally known to represent the merchant, and the agent, after ceasing to represent him, made a contract on his own account and in his own name as usual, the relation between him and the merchant not being known to have been dissolved; evidence of a custom in the tallow trade to reject on such contracts the principal, and to look to the broker for the fulfilment of the contract, was held inadmissible.^c And the existence of a custom in a district to use certain terms in a peculiar sense does not raise a conclusion of law that parties contracting in such a district used those terms in such a sense, but is only evidence from which a jury may draw that conclusion.^d

Where a policy of insurance (in the common form) expressed "that the insurance on the said ship shall continue until she is moored twenty-four hours, and on the goods till safely landed," the Court of King's Bench held that evidence of a usage, that the risk on the goods as well as the ship expired in twenty-four hours,^e was inadmissible.

^b *Magee v. Atkinson*, 2 M. & W. 440; *Jones v. Littledale*, 6 Ad. & E. 486; E. C. L. R. 33.

^c *Trueman v. Loder*, 11 Ad. & E. 589; E. C. L. R. 39.

^d *Clayton v. Gregson*, 5 Ad. & E. 302; E. C. L. R. 31.

^e *Parkinson v. Collier*, Park on Ins. 74. The practice of construing mercantile instruments according to the custom of trade was carried to a great length in the case of *Donaldson v. Forster*, Sittings after Mich. Term, 29 Geo. III., Abbott's Law of Shipp. 275, 8th ed. There, by the terms of the charter-party, it was stipulated that the merchant should have the exclusive use of the ship outwards, and the exclusive privilege of the cabin, the master not being allowed to take any passengers. The defendants insisted that, under a charter-party so worded, it was the constant usage of trade to allow the master to take out a few articles for a private trade. Lord Kenyon admitted evidence to be given to prove this usage, observing, that although *prima facie* the deed excluded this privilege, yet he thought the deed might be explained by uniform and constant usage, the usage being a tacit exception out of the deed. Notwithstanding this high authority, sanctioned as it has, in some measure, been by its adoption and insertion in the very learned work from which it is cited, some doubt may perhaps still be entertained whether the receiving of such evidence be strictly warranted in principle. It should be added that no verdict was given, one of the jury insisting that as there was a positive contract the custom was thereby excluded; see Sir D. Evans's remarks in his edition of Pothier, vol. ii. p. 215.

*Where the vendor of a quantity of bacon warranted it to be of a particular quality, it was held that he could not give evidence of a custom in the trade, that the buyer was bound to reject the contract if he was dissatisfied with it at the time of examining the commodity,^f and Heath, J., who tried the cause, said that it would breed endless confusion in the contracts of mankind if custom could avail in such a case.

So where words have a *known legal meaning* which belongs to them, evidence is not admissible to show that the parties intended to use them in a different sense according to the custom of the country.^g

In some instances, also, where expressions of an ambiguous nature have been employed, even in an instrument which the law, *e. g.*, the Statute of Frauds, requires to be in writing, parol evidence has been admitted, not to vary the terms but to construe the instrument and show what was really intended. Thus, where the words used to express *the consideration of a guarantee
*709] were grammatically ambiguous and consistent with its being past or future; for instance "in consideration of your having this day advanced to *A. B.* £750,"^h which might mean in consideration

^f *Yeats v. Pim*, Holt's C. 95; E. C. L. R. 3; 6 Taunt. 446; E. C. L. R. 1; but see *Bywater v. Richardson*, *supra*, p. 655, n. (c).

^g *Doe dem. Spicer v. Lea*, 11 East, 312; see *per* Parke, B., *Sutton v. Temple*, 12 M. & W. 63; see CUSTOM. To what extent the silence of a mercantile contract on a particular point may be supplied by evidence of the general course and usage of trade is a question, which it would be difficult to answer with exactness and precision; *per* Tindal, C. J., *Whittaker v. Mason*, 2 Bing. N. C. 369; E. C. L. R. 29.

^h *Goldshede v. Swan*, 1 Ex. 154. In *Haigh v. Brooks*, 10 A. & E. 309; E. C. L. R. 37, a guarantee was in these words: "Mr. H., In consideration of your being in advance to *L.* in the sum of £10,000 for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. *J. B.*" The objection being that a past consideration alone was contemplated by the instrument, the Court of Exchequer Chamber held, on writ of error, that there was in this guarantee an ambiguity which might be explained by evidence. So, in *Butcher v. Stewart*, 11 M. & W. 875, where the words were "having released;" and *Edwards v. Jevons*, 8 C. B. 436; E. C. L. R. 65, where the words were "giving credit." In *Bainbridge v. Wade*, 20 L. J., Q. B. 7, where the words were "any sum or sums of money due to you from *L.*, the amount not to exceed at any time the sum of £100," the court held that there was such an ambiguity as might be explained by parol evidence of the circumstances of the parties when the guarantee was given. So, where in a contract to be paid at a certain rate, if an estate were sold by auction, but at a less rate if it were not sold within two months; although four weeks is the primary meaning of the word month, the judge may

"that you had then actually advanced," or "that you shall have this day advanced," evidence was admitted to show that the advance in fact was not a past one, but was made at the same time as the guarantee was executed.

Instances have also occurred in which cipher abbreviations,ⁱ or other like known means have been used in contracts or other instruments; in such cases parol evidence is necessarily admitted, for the reasons already pointed out,^k to ascertain their meaning. Thus, where in a bet on a match to run one greyhound against another the letters *P. P.* were added, parol evidence was admitted to show that they meant "play or pay."^l [*710

In many instances, too, evidence of custom and usage is admissible for the purpose of annexing incidents to the terms of a written instrument, concerning which the instrument is silent; although, if any condition or term in the contract is necessarily repugnant to or inconsistent with the custom, the latter is excluded.^m The principle upon which such evidence is admissible, seems to be a reasonable presumption that the parties did not express the whole of their intention, but meant to be guided by custom as to such particulars as are generally known to be annexed by custom and usage to similar dealings. It is evident that in commercial affairs, and all the other usual and common transactions of life, it would be attended with great inconvenience that the well-known ordinary practice and usage on the subject should not be tacitly annexed, by virtue of such a presumption, to the terms of a contract, and that the parties should either be deprived of the certainty and advantage to be derived from the known course of dealing, or be placed under the necessity of laboriously specifying in their contracts by what particular usages they meant to be bound.

It is unnecessary to allude to the numerous instances in which, upon the same principle, the law itself annexes its own terms to a contract. If a contract for the sale of goods be silent as to the time of delivery, the law annexes the term that they shall be deliv-

construe it to mean calendar months, if such appears to be the intention of the parties from surrounding circumstances at the time of making the contract; *Simpson v. Margitson*, 11 Q. B. 23; E. C. L. R. 63; *Colbourn v. Dawson*, 20 L. J., C. P. 154.

ⁱ *Goblet v. Beechey and others, Executors of Nollekens*, 3 Sim. 24.

^k *Supra*, p. 701.

^l *Daintree v. Hutchinson*, 10 M. & W. 85.

^m *Moon v. Witney Union*, 3 Bing. N. C. 814; E. C. L. R. 32.

ered within a reasonable time. A bill of exchange is payable at a certain day; but the law allows three additional days of grace, concerning which the instrument is silent. The instance of a bill of exchange is also a strong one to show how far custom operates to annex terms not expressed in the instrument.

*711] It has been held that a tenant might avail himself of a *local custom to take an away-going crop after the expiration of his term under a lease; for the custom did not alter or contradict the terms of the lease, but merely superadded a right consequential to the taking.^a Where the stipulations in a lease as to the mode of cultivation applied only to the holding during the tenancy, but were wholly silent as to the terms of quitting; it was held that an affirmative covenant, that the wheat lands should be summer-fallowed, and an affirmative custom for the off-going tenant to have one proportion of the wheat for a way-going crop, if sown after a summer-fallow, and another proportion if sown after turnips, were not so inconsistent that the tenant might not be entitled to his share of wheat growing at the determination of the tenancy after a crop of turnips, the landlord having a right of action, if the covenant had not been observed.^o Upon the same principle, evidence was admitted to show that a heriot was due on the death of the tenant for life, although that duty was not expressed in the lease.^p So it has been held that a custom for an away-going tenant to provide work and labour, tillage and sowing, and all materials for the same, in his away-going year, the landlord making him a reasonable compensation, is not excluded by an express written agreement between the landlord and tenant, which is consistent with such a custom.^q

The presumption necessarily ceases where it can be collected, from the terms of the instrument, that it was contrary to the intention of the contracting parties, in the *particular instance to be guided by the custom: as where the parties have actually

*712] ^a *Wigglesworth v. Dallison*, Dougl. 201; and see the notes, 1 Smith, L. C. p. 299.

^o *Holding v. Pigott*, 7 Bing. 465; E. C. L. R. 20.

^p *Per cur. White v. Sayer*, Palm. 211.

^q *Senior v. Armitage*, Holt's C. 197; E. C. L. R. 3; see *Dalby v. Hirst*, 1 B. & B. 224; E. C. L. R. 5. A usage for a landlord to compensate the off-going tenant for tilling, fallowing, and manuring arable and meadow land, according to good husbandry, and from which the tenant can receive no benefit, is reasonable, and is to be considered not as a custom but a usage, and need not be from time immemorial; see *Roxburghe, Duke of, v. Robertson*, 2 Bligh, 156.

expressed an intention different from the custom, for then according to the general rule of law, *expressum facit cessare tacitum*; or even where a contrary intention may be inferred from the terms of the contract. Thus, where the lease specified certain payments to be made by the in-coming to the out-going tenant at the time of quitting, but specified no payment for foldage, it was held that this agreement excluded the operation of a custom for the in-coming tenant to pay to the out-going tenant an allowance for foldage.^r

But a stipulation as to quitting does not exclude so much of a custom as is not inconsistent with such stipulation. Where a lease provided for the tenant's spreading more manure on the premises than the custom required, leaving the rest to be paid for by the landlord at the end of the term, and the custom was for the tenant to be paid last year's ploughing and sowing, and to leave the manure, if the landlord would buy it, it was held that the tenant was still entitled to be paid for the last year's sowing and ploughing, according to the custom.^s

Parol evidence was admitted to show, that by the custom of the country the word "thousand," applied in a lease to rabbits, meant 1200.^t

*It is a general rule, that oral and extrinsic evidence is admissible to rebut a presumption of law or equity. Here [*713 the evidence is not offered as a substitute for written evidence, but to remove an impediment which would otherwise have obstructed or altered its operation.^u Thus, it has been held that parol evi-

^r *Webb v. Plummer*, 2 B. & Ald. 746; *Roberts v. Barker*, 1 C. & M. 808; *Hughes v. Gordon*, 1 Bligh, 287; *Clinan v. Cooke*, 1 Sch. & Lef. 22.

^s *Hutton v. Warren*, 1 M. & W. 486; *Holding v. Pigott*, 7 Bing. 465; E. C. L. R. 20.

^t *Smith v. Wilson*, 3 B. & Ad. 728; E. C. L. R. 23. So, evidence of the usage of London bankers receiving, from their correspondents (country bankers), a power of attorney to sell stock of a customer of the latter, may be given to show that all moneys so received are placed to the credit of the country banker; *Adams v. Peters*, 2 C. & K. 723; E. C. L. R. 61; of trades in the potteries, that workmen under a contract to work for a whole year should have certain holidays and the Sundays to themselves; *R. v. Stoke-upon-Trent*, 5 Q. B. 303; E. C. L. R. 48. So, a usage, where goods are sold by sample, of a custom to make an allowance for such as do not answer the sample, was admitted by Cresswell, J.; *Cooke v. Riddellien*, 1 C. & K. 561; E. C. L. R. 47. And a usage in the tobacco trade may be proved to show that all sales are by sample, although that term be not expressed in the bought and sold notes; *Syers v. Jonas*, 2 Ex. 111; and see *Furley v. Wood*, 1 Esp. 198; *Doe v. Benson*, 4 B. & Ald. 588; E. C. L. R. 6; and *Smith v. Walton*, 8 Bing. 235; E. C. L. R. 21.

^u 2 Atk. 69, 99; Amb. 126; 2 Vern. 252.

dence is admissible to show that a legacy was not intended in satisfaction of a debt,^x or that the testator, although he gave the executor a legacy, intended that he should have the surplus,^y or to rebut the equity of an heir at law.^z So, where the conusor of *714] a fine dies before the uses are declared, the presumption *that the fine was levied to the use of the conusor may be rebutted by evidence.^a

If a tenant for life pays off a charge on the estate, *prima facie*, he is entitled to that charge for his own benefit, with the qualification of having no interest during his life. If a tenant in tail or in fee-simple pays off a charge, that payment is *prima facie* presumed to be made in favour of the estate; but the presumption may be rebutted by evidence, as by calling for an assignment, or by a declaration.^b

So, oral evidence has been admitted by courts of equity to show that a portion advanced to a child subsequent to the making of a will, and of the same amount with the legacy, was not intended as

^a *Cuthbert v. Peacock*, 2 Vern. 593. But see *Fowler v. Fowler*, 3 P. Wms. 353; where an allowance of pin-money being in arrear to the wife for two years, Talbot, C., would not admit evidence to show the intention of the testator that she should have a legacy of £500 in addition to the arrears.

^y 2 Vern. 252, 648, 673; *Wingfield v. Atkinson*, 2 Vern. 673; 2 P. Wms. 158; 9 Mod. 9; 1 Str. 568. So, where the wife was executrix, and real and personal property were left to her by her husband; *Lake v. Lake*, 1 Wils. 313; Amb. 126, per Buller, J.; Dougl. 40. Evidence is admissible to show that one, *prima facie* a trustee, takes for his own benefit; *Langfield dem. Banton v. Hodges*, Lofft. 230; *Doe v. Langton*, 2 B. & Ad. 680; E. C. L. R. 22. The gift of a legacy in reversion to an executor does not necessarily exclude, but only raises a presumption against his taking the residue beneficially, and if there is no express declaration that he is to be a trustee, but only circumstances raising a presumption, parol evidence is admissible to rebut it; *Oldman v. Slater*, 3 Sim. 84. Where a specific bequest was given in the will to the executor for his care and trouble, held that it excluded him from taking the residue beneficially, and that parol evidence of the testator's declarations, after the making of the will, were inadmissible; *Whitaker v. Tatham*, 7 Bing. 628; E. C. L. R. 20; and see *Foster v. Munt*, 1 Vern. 473; and *Gibbs v. Rumsey*, 2 V. & B. 294.

^z *Mallabar v. Mallabar*, Cas. temp. Talb. 79; Jarman on Wills, c. 13.

^a *Roe v. Popham*, Dougl. 25; *Lord Altham v. Lord Anglesea*, Gilb. Eq. R. 16.

^b Per Lord Eldon, in *The Earl of Buckinghamshire v. Hobart*, 3 Swanst. 186. Where a tenant for life of a settled estate purchased incumbrances and had them assigned to a trustee, and purchased the remainder and had it conveyed, subject to existing charges, and devised the estate subject to the charges so purchased, it was held that parol evidence was admissible to show that the charges were merged; *Astley v. Mills*, 1 Sim. 298.

an ademption of a legacy;^c and for this purpose, and to show the real intention, even oral declarations are admissible.^d

In the case, even of a devise of lands, it was formerly held that the legal implication, as to the revocation of the will, [*715 *founded upon the subsequent marriage of the testator, and birth of a child, might be rebutted by parol evidence.^e Lord Mansfield observed, "I am clear that this presumption, like all others, may be rebutted by every sort of evidence, There is a technical phrase for it in the case of executors;^f it is called rebutting equity." But it has since been settled, that under these circum-

^c *Debeze v. Man*, 2 Bro. C. C. 165; *Coote v. Boyd*, 2 Bro. C. 521. Or, as it seems, to show that such advancement was intended as an ademption; *Rosewell v. Bennett*, 3 Atk. 77. But note, that the intention of the legacy was specified in the will; and the case was not decided on that ground; see also *Hookey v. Hatton*, 1 Bro. C. C. 390, n. Where portions are provided by any means whatever, and the parent gives a provision by will for a portion, it is a satisfaction *prima facie*, unless there be circumstances to show that it was not so intended; *per* Lord Alvanley, *Hinchcliffe v. Hinchcliffe*, 3 Ves. jun. 516; *per* Lord Eldon, in *Pole v. Lord Somers*, 6 Ves. 325. The question there was as to *satisfaction*.

^d *Ellison v. Cookson*, 1 Ves. jun. 100; *Clinton v. Hooper*, 1 Ves. jun. 173. But those made at the time of the will are the most important; *Trimmer v. Bayne*, 7 Ves. 508.

^e *Brady v. Cubitt*, Dougl. 30. See the observations on this case in *Goodtitle v. Otway*, 2 H. B. 516. For the cases in which an alteration in circumstances amounted to an implied revocation of a will, see Bac. Ab. tit. Wills and Testaments; *Brown v. Thompson*, 1 P. Wms. 304; *Lugg v. Lugg*, 1 Ld. Raym. 441; *Shepherd v. Shepherd*, Dougl. 37, n.—Sir D. Evans observes, that "the allowing of a written instrument to derive a construction different from that which it would naturally import, in consequence, not of any relative character of the subject-matter, but of verbal declarations, cannot, on principle, be reconciled with the general tenor of our jurisprudence." It is impossible not to regret, in common with that learned writer, that in any branch of cases, particularly one so important as the present, the uncertainty and vagueness of oral testimony of the very weakest and loosest description should have been substituted for the certainty of a written document. It was in effect to give to oral evidence a greater authority than the written evidence, to subject solemn and authentic written instruments to all the laxity and uncertainty of parol evidence, and to render titles to property, hazardous and precarious. Hence by 7 Will. IV. and 1 Vict. c. 26, no will made after 1st January, 1838, is revoked by any presumption of intention on the ground of an alteration in circumstances, save marriage; ss. 18, 19. See tit. WILLS.

^f An executor is not excluded from proof of the testator's intention that he should take the surplus, by the circumstance of his taking a reversionary contingent interest; *Lynn v. Beaver*, 1 Turn. 63. Such evidence, however, is admissible only for the purpose of supporting the apparent effect of an instrument; it is inadmissible to show that a legacy in a second will was intended as an ademption of a legacy given by a former will; *Hurst v. Beach*, 5 Madd. 360.

stances the will is revoked by a rule of law independently of the intention of the party, and consequently that all evidence of such intention is inadmissible.^g

*716] But although such evidence be admissible to rebut a *presumption arising from the operation of matter in *pais* as to the *intention* of the party to revoke, it is otherwise where the revocation is by act of law, where the law pronounces upon a presumption *juris et de jure*,^h that is, where the presumption of law is so violent that it does not admit circumstances to be set up to repel it.ⁱ Thus, where a testator devised his lands to *B.*, and afterwards, upon his marriage, conveyed them by lease and release to trustees, to other uses, with the usual limitations in marriage settlements, the court, on a trial at bar, refused to hear parol evidence to show that the deviser meant that his will should remain in force.^k

III. *As original and independent evidence.*—Having thus seen how far parol evidence is admissible to *contradict, vary, or wholly subvert* a written instrument, as also, on the other hand, to *establish, explain, and support* written evidence, it remains, in the *third* place, to consider in what cases parol extrinsic evidence is admissible to prove a fact by virtue of its own weight and authority, notwithstanding the casual existence or use of collateral written evidence to prove or disprove the same fact. What has been already said supplies, indeed, a sufficient test; for it seems that, in general, the mere circumstance that a written instrument exists which *may* be made evidence of a particular transaction, does not exclude oral testimony either to prove or disprove the fact, unless that written instrument be by law constituted the *authentic* and *sole* medium *717] of proving that fact.¹ The importance of the subject, *however, renders it desirable further to consider, 1st, in what

^g *Marston v. Roe dem. Fox*, 8 Ad. & E. 14; E. C. L. R. 35, in Cam. Scacc.; and stat. 7 Will. IV. and 1 Vict. c. 26, s. 18, *supra*, note (e).

^h See *Marston v. Roe dem. Fox*, and tit. PRESUMPTION, *post*.

ⁱ See 2 H. Bl. 522.

^k *Goodtitle v. Otway*, 2 H. B. 516.

¹ See *Grey v. Smithyes*, Burr, 2273, and *infra*. Still less does the existence of a deed or other written instrument exclude parol evidence as to a collateral transaction; *Fletcher v. Gillespie*, 3 Bing. 635; E. C. L. R. 11. So, in the case of a parol agreement to do repairs, in consideration that the plaintiff would become tenant to the defendant; *Seago v. Deane*, 4 Bing. 459; E. C. L. R. 13. So, where the parties to an indenture of charter-party afterwards agreed by parol for the use of the ship, *ad interim*; *White v. Parkins*, 12 East, 578, *supra*, p. 656, 657, note (d).

instances written instruments are of an *exclusive* nature; 2ndly, with respect to what *parties* and to what *facts*.

In the first place, written evidence has an exclusive operation in many instances, by virtue of peremptory legislative enactments.^m So it has in all cases of written contracts.ⁿ

So, also, in all cases where the acts of a court of justice are the subject of evidence. Courts of record speak by means of their records only; and even where the transactions of courts which are not, technically speaking, of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognizes.^o And it seems that, in general, where the law authorizes any person to make an inquiry of a judicial nature, and to register the proceedings, the written instrument^p so constructed is the only legitimate medium to prove the result.

Thus, as has been seen, parol evidence cannot be received of the declaration of a prisoner taken before a magistrate where the examination has, as required by the statute, been taken in writing.^q So, the official return *of the sheriff to a writ of execution is usually conclusive as between the litigating [*718 parties, although not as between them and himself.^r

But, in general, public and authorized documents, whether appointed by express authority of law, or recognized by the law

^m Tit. FRAUDS, STATUTE OF, and WILLS.

ⁿ *Supra*; and tit. ASSUMPSIT.

^o *Vide* tit. JUDGMENT—INSOLVENT. In *Bledstyn v. Sedgwick*, Ann. 304, the court refused to hear parol evidence of the condemnation of a ship in Carolina, a copy of the condemnation which had been given to the captain having been lost at sea.

^p See tit. JUDGMENT.

^q *R. v. Lambe*, *supra*, 2 Leach, 559; *R. v. Jacobs*, *ib.* 310; and see the cases, 2 Russ. by Greaves, 876, *et seq.* So, additional statements made by a prisoner before a magistrate, and not contained in the written examination, may be proved by parol; *Venafrá v. Johnson*, 1 M. & Rob. 316. What a prisoner says before he may know the charge against him is admissible; interlineations and erasures in a confession are cured by the attestation; and that it is no objection that it is said to be *signed*, where the party was a marksman; and a voluntary confession, taken before the conclusion of the evidence against the prisoner, may be given in evidence on the parol statement of the clerk, refreshing his memory by the paper; *R. v. Bell*, 5 C. & P. 162; E. C. L. R. 24, questioning *R. v. Fagg*, 4 C. & P. 566; E. C. L. R. 19; *Jeans v. Wheedon*, 2 M. & Rob. 486. But parol evidence may be given of the same declarations made by the prisoner at other times; *M'Carthy's case*, M'Nally on Ev. 45.

^r *Gyfford v. Woodgate*, 11 East, 297.

as instruments of authority, if they be but collateral memorials of the fact, possess no exclusive authority as instruments of evidence. Thus, although the entry of a marriage in the parish registry, made according to the Marriage Act, be evidence of the marriage, it does not exclude the parol evidence of any witness who can prove the fact of marriage. So, although public printed proclamations of government, gazettes, public books, official returns, and other^a documents of authority, are admissible in evidence to prove particular facts, they do not exclude parol evidence. The principle applies in general, as it seems, where the document contains a mere subsequent memorial and recognition of the fact.

A receipt for money, it has been held, is not conclusive evidence against the person who gives it, that he has actually received the money.^b Thus, upon the failure of an annuity deed for want of a memorial, upon an action brought by the plaintiff against the two grantors, to recover the consideration paid, one of the defendants, who was a surety only, was permitted to show, notwithstanding *719] his having signed a receipt for the money, jointly with the *other defendant, the principal, that he had never in fact received the money.^{c1}

^a Tit. WRITTEN EVIDENCE.

^b And may therefore be explained or contradicted by parol; *Graves v. Key*, 3 B. & Ad. 318; E. C. L. R. 23. So, a receipt in full of all demands; but see *Alner v. George*, 1 Camp. 392, and *Bramston v. Robins*, 4 Bing. 11; E. C. L. R. 13.

^c *Stratton v. Rastall and another*, 2 T. R. 366; and see *The Attorney-General v. Randall and others*, 2 Eq. C. Abr. 742; where, although a receipt had been signed by three trustees, the Lord Chancellor decreed that only the one who had received the money should be answerable for it; but see *Rowntree v. Jacob*, 2 Taunt. 141; also 1 Sid. 44; 1 Lev. 43; Co. Litt. by Harg. and Butler, 373; *Latour v. Bland*, 2 Stark. C. 382; E. C. L. R. 3.

¹ Parol evidence is admissible to explain or even contradict receipts; *Johnson v. Weed*, 9 Johns. 310; *Badger v. Jones*, 12 Pick. 371; *Baugh v. Brassfield*, 5 J. J. Marsh. 79; *Southwick v. Hayden*, 7 Cow. 334; *Giddings v. Munson*, 4 Verm. 308; *Whitbeck v. Whitbeck*, 9 Cowen, 266; *Brooks v. White*, 2 Metcalf, 283; *Humphries v. McCraw*, 5 Pike, 61; *Jones v. Patterson*, 1 Watts & Serg. 321; *Pettus v. Roberts*, 6 Alabama, 811; *Huston v. Becknell*, 4 Missouri, 39; *Wayland v. Moseley*, 5 Alabama, 430; *Jones v. Ward*, 10 Yerger, 160; *Bebee v. Moore*, 3 McLean, 387; *Hogan v. Reynolds*, 8 Alabama, 59; *Steamboat Missouri v. Webb*, 9 Missouri, 193; *McKeagg v. Callahan*, 13 Ala. 828.

So the recital in a deed of the payment of the consideration money may be contradicted or explained; *Shepherd v. Little*, 14 Johns. 210; *Morn v. Shattuck*,

In the case of *Wilson v. Poulter*, which is very briefly reported,* it is stated merely that a defendant in trover was charged with his *confession* taken before commissioners of bankrupts, and that the Chief Justice refused to let the defendant explain it by parol evidence. It is not stated in what way the defendant proposed to explain the document; and it would not be safe to rely much on so very loose a report.

In the common case of a confession taken before a magistrate, on a charge of felony, the practice is for the prosecutor to prove by evidence that the written document produced is a faithful account of the prisoner's statement; upon principle, therefore, it scarcely admits of doubt that the prisoner is at liberty to meet such evidence by contrary testimony, and to show that the written instrument is inaccurate. The statutes⁷ which authorize the magistrate to take the examination of prisoners, do not give them an exclusive force; and their admissibility and operation as evidence seem to stand upon the same footing with any other admissions at common law, which, in such instances, are usually inconclusive.⁸ And it seems that, in general, where a document, such as a letter, not being matter of compact and agreement, is given in evidence as *an admission by the adversary, the latter may adduce evidence to show that it originated in mistake, or to explain [*720 it by circumstances.⁹

* Str. 794. In *Rowland v. Ashby*, Ry. & M. 231; E. C. L. R. 21, it was held that admissions made by a party on his examination before commissioners of bankrupts, and which were material, though not contained in the written examination, might be proved; and see *Venafrá v. Johnson*, *supra*, p. 717, n. (q).

⁷ 7 Geo. IV. c. 64; 11 & 12 Vict. c. 42; and see tit. ADMISSIONS.

⁸ Tit. ADMISSIONS.

⁹ Tit. ADMISSIONS; and see *Holsten v. Jumpson*, 4 Esp. C. 189; *Macbeath v. Haldimand*, 1 T. R. 182.

4 N. Hamp. 229; *Wilkinson v. Scott*, 17 Mass. 249; *Strawbridge v. Cartledge*, 7 Watts & Serg. 394; *Mead v. Steger*, 5 Porter, 498; *Burbank v. Gould*, 3 Shepley, 118; *Saunders v. Hendrix*, 5 Alabama, 224; *Clapp v. Tirrell*, 20 Pick. 247; *Lirgun v. Henderson*, 1 Bland. 236; *Deloach v. Turner*, 6 Richardson, 117.

The taking of a receipt on payment of money does not preclude proof of such payment by other evidence; *Berry v. Berry*, 2 Harrison, 440.

The rule that parol evidence is inadmissible to vary the terms of a written instrument, does not apply to a writing which is merely evidence of a fact, and not of a contract or right; *McCrea v. Purmort*, 16 Wendell, 460.

Parol evidence may be given of the payment of money or delivery of goods notwithstanding a receipt has been given; *Wiggins v. Pryor*, 3 Porter, 630; *Dana v. Boyd*, 2 J. J. Marshall, 587.

In an action brought by bankers to recover back money paid on a cheque purporting to be drawn by the defendant, but alleged to be a forgery, and which was the fact in issue, it was held, that minutes of the defendant's examination on a charge made against a party as having forged a cheque, were receivable, although he afterwards signed the regular deposition.^b

2dly. Next, with respect to the *parties*, and the particular *facts* which the instrument recites. The instrument offered in evidence, whether record, deed, or simple contract, is offered either as between the *same* parties, or where either one or both are *different*. Even where both parties are the same, it frequently happens that the instrument will not operate as an *estoppel*, unless it be specially *pleaded* as such;^c and if it has not been so pleaded, parol evidence of the fact is usually admissible in contradiction of the written instrument.

In the next place, even where a record or deed exists, which is *conclusive* upon the *parties*, it is not always conclusive upon *all points*.

Thus, evidence is admissible to prove that a deed was executed, or a bill of exchange made, at a time different from that of the date,^d or that a party in whose name ^{*a}a contract for the sale
*721] of goods was made was the agent of another.^e For the

^b *Williams v. Woodward*, 4 C. & P. 346; E. C. L. R. 19.

^c *Tit. ESTOPPEL*.

^d The plaintiff may declare on a bond bearing date on one day, and prove a delivery on another day (*Goddard's case*, 2 Rep. 4, b), or allege a deed to have been delivered on a day different from that on which it bears date; *Hall v. Cazenove*, 4 East, 477; *Stone v. Bale*, 3 Lev. 348; *Styles v. Wardle*, 4 B. & C. 908; E. C. L. R. 10. Parol evidence is admissible to show that land described in a deed as meadow was not meadow, for it is not the essence of the deed, but mere matter of description; *Skipwith v. Green*, Str. 610. Or that land described as containing five hundred acres does not contain so many; *S. C. Bac. Ab. Pleas*, (I. 11). Where a deed contains a generality to be done, as to perform all agreements set down by A., 1 Rol. 872, P.; to carry away all the marl in close B., *Ib.*; to release all his right in C., *Ib.*; 2 Cowp. 600; he is not estopped from denying such agreements, &c.; Com. Dig. Estoppel, A. 2. A latitat alleged to have been issued on a particular day after term, may be proved to have been so issued, though tested of the preceding term; *Walburgh v. Saltonstall*, Vent. 362. If a written acknowledgment to take a case out of the Statute of Limitations have no date, parol evidence may be given to prove when it was written; *Edmunds v. Downes*, 2 C. & M. 459. So, in the case of a ratification of a contract entered into in infancy; *Hartley v. Wharton*, 11 A. & E. 934; E. C. L. R. 39; and of a written promise made after bankruptcy to pay a debt barred by certificate; *Lobb v. Stanley*, 5 Q. B. 574; E. C. L. R. 48.

^e *Wilson v. Hart*, 7 Taunt. 295; E. C. L. R. 2. That is for the purpose of

same reason, a dormant partner may be charged on a contract made by the ostensible partner in their own names.^f And even in the case of records, which are conclusive as far as regards their substance, averments and proofs may be received to contradict them as to time and place and many other particulars.^g

The reason is, that in the case of the record, the points of variance would not have been considered to be material at the trial, and therefore the evidence does not in effect contradict the record; and that in the case of deeds or other agreements it was not the intention of the contracting parties to bind themselves precisely as to such particulars, such instruments being, for the sake of convenience, frequently executed on days different from those on which they bear date, and commercial agreements being as frequently* made on behalf of a principal in the name of an agent.^h [722

The parties to a written agreement are not, in general, precluded from proving facts consistent with the agreement, although not expressed in it. Where the written agreement was, that *Maxwell* should purchase of *Sharp* £2000 stock, it was held that the plaintiff, *Maxwell*, might give in evidence a parol agreement to buy £2000 stock (which belonged to *Sharp* and *Abbott*, but stood in the name of *Sharp*) of *Sharp* and *Abbott*, the parol being consistent with the written agreement.ⁱ

charging the principal, not of discharging the agent; see *Higgins v. Senior*, 8 M. & W. 834, *supra*, p. 665. So a purchaser of land, having made the purchase in the name of another, may show that he (the purchaser) paid for it, in order to raise a resulting trust; 2 Vern. 366. Where parol evidence was offered (to raise an equity) that a pension granted by the Crown absolutely was in trust for the plaintiff, which the defendant, by his answer, denied, the evidence was rejected by Lord Thurlow; *Fordyce v. Willis*, 3 Bro. C. C. 577.

^f *Beckham v. Drake*, 9 M. & W. 79; 11 M. & W. 315.

^g See Stark. Crim. Pleading, 2nd ed. 325; and tit. JUDICIAL INSTRUMENTS.

^h Tit. AGENT; tit. PARTNERS; and tit. VENDOR AND VENDEE.

ⁱ *Maxwell v. Sharp*, Say. 187. Where one partner deposited his own deeds under a written memorandum "as a security in the dealings which the party had with him," held, that evidence to show that the dealings alluded to were partnership transactions, was admissible, and established the lien for payments made on behalf of the firm; *Chuck v. Freen*, M. & M. 259; E. C. L. R. 22; *S. C.*, *contra*, 2 Glyn & J. 246; see *Turner v. Deane*, 3 Ex. 837. So, a release reciting that disputes subsisted between *A.* and *B.*, and that it had been agreed that to put an end to them *B.* should pay *A.* money, and each should execute a release to the other, and the release given was of all actions whatever, and *A.* afterwards sued *B.* and *C.* for a joint cause of action, parol evidence was admitted that there were mutual actions between *A.* and *B.* other than that of *A.* against *B.* and *C.*; *Simons v. Johnson*, 3 B. & Ad. 175; E. C. L. R. 23.

And as between the parties to a deed, or those who claim in privity, evidence is admissible to show the purpose and intention of executing the instrument, provided it be perfectly consistent with the legal operation of the instrument, and not inconsistent with its express terms. Thus, in the case of *Milbourn v. Ewart and others*,^k where a man, in contemplation of marriage, executed a bond to his intended wife (the plaintiff,) conditioned for the payment of money by the heirs or executors of the obligor to the plaintiff, at the expiration of twelve calendar months from and after the death of the obligor, and to an action on the bond against the heirs-at-law of the deceased husband, they pleaded the marriage, &c., and *723] the plaintiff replied *the fact that the bond was made in contemplation of a marriage between the defendant and the obligor, and with intent that, in case the marriage should take place, and the plaintiff should survive her husband, the plaintiff should have the benefit of the bond, it was held that those facts might well be averred, being perfectly consistent with the bond.

It has already been seen that, as between parties to a deed, evidence of a further consideration than that expressed in the deed is admissible where the evidence does not contradict the deed.^l

Except in cases where the Statute of Frauds, or other law, requires a written agreement, parol evidence may be admissible, in conjunction with written, to prove the agreement. Thus, if an agreement be reduced into writing, parol evidence is admissible to show that the parties, without writing, afterwards varied the terms;^m for here the evidence is offered, not to vary the terms of an instrument which stands admitted as the real record of the intention of the parties, but is offered consistently with the existence of the instrument, and confessing that it does so exist, in order to avoid its effect by proof of a new agreement, adopting the old one, either wholly or in part, but annexing certain additional terms.

^k 5 T. R. 381.

^l *Supra*, p. 659. So a deed which recites a pecuniary consideration only, may be shown to have been founded on a consideration of marriage; *Villers v. Beaumont*, *supra*, p. 660. Where premises were purchased at a sale in different lots by the plaintiff and defendant, and in their deeds the premises were described only by reference to the then tenants; held, that a handbill exhibited at the sale was admissible, not as controlling, but explaining and applying the deed, and showing what was then in the tenants' occupation; *Murley v. McDermott*, 8 A. & E. 138; E. C. L. R. 35.

^m *Supra*, p. 655.

It has, indeed, already been seen, that previous or contemporary declarations are not admissible to vary the terms of a written agreement; where, however, the nature of the subject-matter does not require the agreement to be *in writing, although a [724 presumption arises, in the absence of proof to the contrary, that the parties expressed in writing the *whole* of their intention in respect of the subject-matter, and intended the written terms to operate as an agreement, yet that presumption may, it seems, be rebutted by express evidence that what was so written was intended as a mere memorandum of one part or branch only of a more general agreement, and was not intended to operate absolutely and unconditionally," or it may be shown that a parol contract was made independently, wholly collateral to and distinct from a written one made at the same time. In such cases, the parol evidence is used, not to *vary the terms* of the written instrument, but to show either that it is *inoperative* as an entire and independent agreement, or that it is collateral and irrelevant.

Where a statute requires the agreement to be in writing, the case admits of a very different consideration; there the oral and written terms could not be incorporated; and it was formerly doubted, whether the previously written agreement would be discharged and revoked by a subsequent oral agreement.^o It is

ⁿ See *Jeffery v. Walton*, 1 Starkie, C. 267; E. C. L. R. 2. The action was in *assumpsit* for not taking proper care of a horse. A written memorandum was made upon hiring a horse, "six weeks, at two guineas—W. W." (the hirer); Lord Ellenborough held that evidence was admissible to show that at the time of the hiring it was expressly stipulated, that as the horse was used to *shy*, the hirer, if he took him, should be liable to all accidents. In many instances, the terms reduced to writing may constitute but a small part of the real contract. Suppose *A.* to let a house by parol to *B.* for two years, and that at the time of the parol agreement a stipulation as to the furniture is made, for convenience of calculation, in writing, and that at the foot of the account is written "*B.* to take the furniture at the above valuation," it would be difficult to contend that *B.* would be bound to buy the furniture, although *A.* refused to let him occupy the house, and that he would be concluded by the written part of the engagement from showing the real condition annexed to it; see *per Cur. Goss v. Lord Nugent*, 5 B. & Ad. 64; E. C. L. R. 27; *Allen v. Pink*, 4 M. & W. 140.

^o An agreement to waive a contract for the purchase of lands is as much an agreement concerning lands as the original contract is, and it was therefore thought must be in writing; see *per Lord Hardwicke, Buckhouse v. Crosby*, 2 Eq. C. Abr. 32; *Bell v. Howard*, 9 Mod. 302. But unless it be sought to *charge the party* on the altered agreement this is not so, for the statute only requires writing in that case. In *Parteriche v. Powlett*, 2 Atk. 384, Lord Hardwicke is reported to have said, that to add any thing to an agreement in writing, by admitting parol

*725] however now *settled, that in cases which are within the scope of the Statute of Frauds, parol evidence is admissible to show a dispensation with the performance of part of the original contract, such as an agreed substitution of other days than those stated in the contract for the delivery of goods sold,^p or even to show that it has been totally rescinded.^q And where a written contract states a time and place for the delivery of goods, an alteration as to the time not in writing, though effectual to *discharge*, is not valid to *charge* the party, unless it be in writing.^r

Next, where one of the contending parties was *not a party* to the record or other instrument. It has been seen, that in some *726] instances, where the proceeding is, as it is *technically termed, *in rem*, the judgment or decree is final and conclusive upon all.^s Where, however, the record is admissible but not conclusive evidence, even parol evidence seems to be admissible to prove the fact in contradiction of the record.

Thus, upon an indictment against an accessory to a felony although the record of the conviction of the principal be admissible evidence to prove the fact, yet, as it is not conclusive, the accessory is entitled to adduce any legal evidence in contradiction of the fact stated on the record.^t

Although there are many instances in which a deed or agreement between others is evidence for or against a stranger, yet it

evidence which would affect land, is not only contrary to the Statute of Frauds, but to the rule of common law before the statute was in being; yet, as mere parol agreements concerning land were operative before the statute, there seems to have been no reason why a written contract should not have been varied by a subsequent oral agreement when it related to lands, as well as in any other case; see *Clinan v. Cooke*, 1 Sch. & Lef. 35.

^p *Cuff v. Penn*, 1 M. & S. 21; *Warren v. Stagg*, cited in *Littler v. Holland*, 3 T. R. 591; *Thresh v. Rake*, 1 Esp. C. 53, *cor.* Lord Kenyon; where, in a written agreement, an appraisement on a given day was specified as a condition precedent, oral evidence of an enlargement by consent was admitted; *cor.* Lord Kenyon; but see *Snowball v. Vicaris*, Bunb. 175. In *Cuff v. Penn*, 1 M. & S. 26, Lord Ellenborough observed, "If this agreement had been varied by parol, I should have thought, on the authority of *Meres v. Ansell*, 3 Wils. 275, that there had been strong ground for the objection." But *Meres v. Ansell* was decided wholly upon the general principle of the admissibility of a *cotemporary* parol agreement to the very terms of a written one.

^q *Goss v. Lord Nugent*, 5 B. & Ad. 66; E. C. L. R. 27.

^r *Marshall v. Lynn*, 6 M. & W. 109; *supra*, p. 663.

^s *Supra*, tit. JUDICIAL INSTRUMENTS; and *vide infra*, tit. SETTLEMENT.

^t Tit. ACCESSORY.

seems to be a general rule, that in all these cases parol evidence of the fact would still be admissible.

Thus, in the case of *The King v. Scammonden*,ⁿ already cited, the inhabitants of a parish were permitted to show that £30 was in fact paid as the consideration upon the sale of an estate, although the deed of conveyance between the parties specified £28 as the consideration. Here the question was as to the value actually given for the estate; and although the agreement was *primâ facie* evidence as to the fact, and although the parties themselves might have been bound by their own representation of the transaction, it was not binding upon strangers, to the exclusion of the [*727 *real fact. In the case of *The King v. Laindon*,^v the question as to a settlement was, whether the parties intended to contract as master and servant, or as master and apprentice; the written agreement was as follows: "I, *J. M.*, do hereby agree with *J. C.* to serve me three years, to learn the business of a carpenter, the first year to have 1s. 2d. per day, the second year to have 1s. 6d. per day," &c. In addition to this, *J. C.* was admitted to prove, at the trial, that at the time of signing the agreement he agreed to give *J. M.* the sum of three guineas, as a premium to teach him the trade, and that he was not to be employed in any other work. The Court of King's Bench held that the evidence was admissible.^x It is, however, to be observed upon this case, that the question might have been very different indeed, had it arisen as between the contracting parties; as if, for instance, a dispute had arisen between them as to the nature of the service which the master had a right to exact by virtue of the agreement. If in that case the servant had insisted on the co-existing parol agreement to limit his service to carpenters' work, the objection would have operated strongly that this would have been to superadd terms by parol to those contained in the written instrument, or to explain the

ⁿ 3 T. R. 474. So in *R. v. Llangunnor*, 2 B. & Ad. 916; E. C. L. R. 22; the deed of apprenticeship stating the money to have been paid by *J. M.*, evidence was admitted to show that it was in part parish money; and see *R. v. Wickham*, 2 Ad. & El. 517; E. C. L. R. 29; where it was held that a parish might show a settlement by renting a tenement in *A.*, although the lease stated it to be in *B.* Clearly parish officers are not estopped from showing the true consideration for a conveyance; *R. v. Inhabitants of Cheadle*, 3 B. & Ad. 833; E. C. L. R. 23; and see *R. v. Olney*, 1 M. & S. 387; and case where evidence has been admitted of a consideration different from that expressed in the deed, *supra*, p. 659.

^v 8 T. R. 379; see also *R. v. Shinfield*, 14 East, 544.

^x *Per* Lord Kenyon, C. J., and Lawrence, J.

intention of the parties by parol evidence. But the question was between strangers to the contract; the point in issue was, the real intention of the parties when they committed certain terms to writing; the terms so written were admissible evidence, as tending to prove the fact, on the natural presumption, in the absence of all suspicion of fraud, that the parties would disclose their real intention; but this was not the *only* medium of proof, neither was it an *exclusive* one, for the private statement of the parties could not, on any principle, bind and estop strangers.

*728] Where the action was brought against the heir and *devisee, on a bond, and issue was taken on the fact, whether the defendant had sold the estate for more than £168, a lease and release were produced in evidence, from which it appeared that the defendant had sold the estate for £210, but it was held that he was at liberty to prove that part of the estate so sold did not belong to the testator, but had been purchased by the defendant for the sum of £42, in order to be sold to the vendee.⁷ Here the evidence was consistent with the terms of the deed; but even if it had not been so, it seems that it would still have been admissible as between those parties; for although, as between the defendant and the vendee, the defendant might have been estopped by his deed from making any averment against it, yet as between the plaintiff and defendant there was no mutuality, and consequently no estoppel, and therefore the defendant was not concluded, upon issue joined as to the amount for which the estate sold, from showing the real fact. It was held in the same case, that although the deed stated that the consideration was paid to the vendor, evidence was admissible to show that it was paid to a third person, with his privity.

A party to a deed may, in an action between others, contradict the deed by his testimony; thus, one who has jointly with another executed an assignment of a ship, as of their joint property, is competent to prove that he had no interest in it.⁸

With the exceptions already adverted to, the general inference, as above stated, seems to be, that oral evidence may be used indifferently as original and independent evidence of a fact, either concurrently with or in opposition to written testimony;⁹ and

⁷ *Green v. Weston*, Say. 209.

⁸ *Walton v. Shelley*, per Willes, J., 1 T. R. 301.

⁹ An order for good, describing their number and kind, is evidence for the plaintiff in an action against the defendant for not delivering the goods, although no time or price was mentioned; and the defendant's acceptance of the order, and the

that written evidence, however* superior it may be, and frequently is in effect, to mere oral evidence, does not in any case, of its own authority, unaided by an express rule of law, exclude such evidence. [*729]

In an action for bribery at an election, it was held that parol evidence was admissible to prove the delivery of the precept to the returning officer, although it appeared that *the returning officer had indorsed upon the precept, with a view to prove it, the time of his having so received it, and that the indorsement had been attested by two witnesses.^b [*730]

price agreed upon, may be proved by parol; *Ingram v. Lea*, 2 Camp. 521. Where the terms of adjustment with an underwriter were indorsed on the policy, and the money was paid, parol evidence was admitted of a previous agreement, that if the other underwriters should eventually pay a less sum, the surplus should be returned; *Russell v. Dunskey*, 6 Moore, 233; E. C. L. R. 17. The fact that a receipt has been given does not exclude parol evidence of payment; *Rambert v. Cohen*, 4 Esp. C. 213. An oral admission by a defendant is evidence of a debt, although at the same time a written admission was entered in a book, which cannot be read for want of a stamp; *Singleton v. Barrett*, 2 C. & J. 368; *Jacob v. Lindsay*, 1 East, 460; *Maugham v. Hubbard*, 8 B. & C. 14; E. C. L. R. 15; *Slatterie v. Pooley*, 6 M. & W. 664; and see *supra*, p. 506. *Semble*, evidence is admissible that notes were issued by a corporation for a different purpose than that for which they were authorized to issue them; *Stark v. Highgate Archway Company*, 5 Taunt 792; E. C. L. R. 1.

So, where a memorandum of an intended agreement was read over to an intended tenant, but never signed, parol evidence of the terms was admitted; *Doe d. Bingham v. Cartwright*, 3 B. & Ald. 326; E. C. L. R. 5; *R. v. Wrangle*, 2 A. & E. 514; E. C. L. R. 29; *Trewhitt v. Lambert*, 10 A. & E. 470; E. C. L. R. 37; *Lord Bolton v. Tomlin*, 5 A. & E. 856; E. C. L. R. 31; *R. v. Worth*, 4 Q. B. 132; E. C. L. R. 45. Where the plaintiff's agent entered into a verbal agreement with the defendant, and made a memorandum of the terms to assist his own recollection, which was not signed, it was held unnecessary to produce it; *Dalison v. Stark*, 4 Esp. 163. So a memorandum delivered by the auctioneer to the bidder, to whom lands were let by auction, containing a description of them, the term, and the rent to be paid, but not signed by any one, is not such a writing as to exclude parol evidence; *Ramsbottom v. Tunbridge*, 2 M. & S. 434. So the fact of tenancy may be proved by parol, although there be a written lease; *R. v. Kingston-upon-Hull*, 7 B. & C. 661; E. C. L. R. 14; but the term can be proved by the lease only; *R. v. Merthyr Tydvil*, 1 B. & Ad. 29; E. C. L. R. 20; *Augustien v. Challis*, 1 Ex. 279. So, the fact that goods were deposited for sale may be proved by parol, although the terms may be in writing, and can be proved by writing only; *Whitfield v. Brand*, 16 M. & W. 282; *Keys v. Harwood*, 2 C. B. 905; E. C. L. R. 52.

^b *Grey v. Smithyes*, Burr. 2273. It appeared in the case of *Reason and Trantor*, Stra. 499, that the dying declaration of Mr. Lutterel, the deceased, had been taken down in writing by a witness, at the instance of two justices of the

Where letters are written in so dubious a manner as to be capable of different constructions, or to be unintelligible, without the aid of extrinsic circumstances, their meaning becomes a question of fact for the jury, and parol evidence of such extrinsic facts is admissible; as in the case of libels, threatening letters, or a letter offered in evidence to prove acknowledgments to take a case out of the Statute of Limitations. But if they cannot be explained by extrinsic circumstances, then, like deeds or agreements, their construction is matter of law for the court.^a

So, an instrument in itself defective and inoperative may be confirmed and supplied by oral testimony, and operate in conjunction with it. Thus, where in the bishop's register a blank was left for the name of the patron, it was held that this might be supplied by oral testimony,^a for as the presentation itself might have been by parol, it might have been proved by the aid of the suppletory parol *731] evidence, *consequently there was no unwarranted substitution of oral for written evidence.

In order to exclude oral evidence of a contract, it is necessary to prove that there is a subsisting written contract. And, therefore, after the plaintiff in ejectment had given parol evidence of the tenancy, the evidence was held to be sufficient, although it appeared upon the cross-examination of his witness that an agreement relative to the land in question had been produced upon a former trial, and still existed; but he could not say whether it was a subsisting agreement or between these parties.^a

peace who were present; the witness had afterwards copied the writing thus made, and produced it at the trial; but the original was not produced. The court held that the copy was not evidence. Upon this it may be observed, that although the copy was not evidence, the original being still in existence, and being better evidence than the copy, yet it seems that, in such a case, the mere fact that the witness reduced the declarations to writing at the time, would not have excluded parol evidence of those declarations, the instrument not being an authentic one, authorized by the statute of Philip and Mary; see *Sayer's case*, 12 Vin. Ab. A. b. 23, pl. 7. In the same case other declarations of the deceased, which had not been taken down in writing, made at other times, were received in evidence; see *R. v. Smith*, 2 Stark. C. 208; E. C. L. R. 3.

^a *Per Buller, J., Macbeath v. Haldimand*, 1 T. R. 182.

^a *Bishop of Meath v. Lord Belfield*, 1 Wils., 215.

^a *Doe d. Wood v. Morris*, 12 East, 337; *Doe d. Shearwood v. Pearson*, *ib.* 238, n. So where a party had agreed to sell goods on commission, but the objection that the agreement was in writing was not made till the agreement had been proved; *Whitfield v. Brand*, 16 M. & W. 282; and see *Keys v. Harwood*, 2 C. B. 905; E. C. L. R. 52. Obviously, if the plaintiff's case be established without

A mere unsigned memorandum, made with a view to a subsequent agreement, need not be proved.^f

There is a distinction between the exclusion of evidence by the operation of this rule, and a mere failure or defect in evidence which is in itself admissible. The effect of the rule is to exclude particular evidence altogether until proof be given that better evidence is unattainable; and when such proof has been given, to admit the evidence of *inferior degree. But evidence tending to the proof may be admissible, yet insufficient, and [*732 may still be so, although it be proved that better evidence cannot be had.

In the case of *Williams v. The East India Company*,^g the question was, whether the agent of the defendants, who were the freighters of the plaintiff's ship, had appraised the plaintiff or his officers of the inflammable and dangerous nature of a quantity of rohan, which had been stowed on board the ship, and which ultimately occasioned its destruction. It was the duty of the conductor of military stores to convey goods on board the ship, and of the chief mate to receive them; the chief mate was dead, and no evidence was given of what passed between him and the conductor of the stores; but the captain and second mate proved that no communication had been made to them of the nature of the roghan. It was objected, that the conductor of the stores ought not to have been examined, and it was so ruled by Lord Ellenborough at Nisi Prius, and afterwards decided by the whole court, on the ground, 1st, that the delivery without notice thus insisted upon by the plaintiff was a criminal act, and that therefore it was incumbent on the plaintiff

showing that there was any writing, he will not be nonsuited by the defendant producing it; nor can the latter do so, unless it be properly stamped, &c., as it is his own evidence; *Fielder v. Ray*, 6 Bing. 332; E. C. L. R. 19; *R. v. Padstow*, 4 B. & Ad. 208; E. C. L. R. 24. *Secus*, where it appears by the plaintiff's evidence that there is a written agreement; *Fenn v. Griffith*, 6 Bing. 533; E. C. L. R. 19; and consequently in *Curtis v. Greated*, 1 A. & E. 167; E. C. L. R. 28; which was an action by the purchaser against the auctioneer to recover the deposit upon failure of title, and the plaintiff produced the conditions of sale, one of which required the execution of an agreement to pay the residue by the purchaser, and it further appeared that there was a written agreement of sale signed by him; the defendant was held entitled to ask whether it related to the deposit, with a view to oblige the plaintiff to produce it, if the answer was in the affirmative.

^f *Doe v. Cartwright*, 3 B. & Ald. 326; E. C. L. R. 5; *Dalison v. Stark*, 4 Esp. 163, *post*; *Ramsbottom v. Tunsbridge*, 2 M. & S. 434.

^g 3 East, 192. See the case of *Koster v. Reed*, 6 B. & C. 19; E. C. L. R. 13; and Vol. II. tit. POLICY OF INSURANCE—PRESUMPTIVE EVIDENCE OF LOSS.

to prove the neglect to give notice; and, 2dly, that the plaintiff had not given sufficient *primâ facie* evidence of the want of notice. The defect in this instance seems to have consisted rather in a failure in the measure of the proof, than in the substitution of secondary for original evidence. It was necessary to negative the fact of communication, which, under the circumstances, could be proved by no one but the conductor, for the chief mate was dead; and that evidence which was essential was not given. The evidence which was received from the captain and second mate, that they did not know that any communication had been made of *733] the nature of the article, was not evidence of a secondary *nature, substituted in the place of superior evidence; for it was at all events admissible evidence, and would still have been admissible had the conductor been called, contrary to the nature of secondary evidence, which can never be admitted where the superior evidence is adduced, but is wholly superseded by it. Neither, like secondary evidence, could it have been substituted for the superior evidence, when the latter had become unattainable; for had the conductor been dead, there would still, it seems, have been a defect in the evidence incapable of being supplied by that of the captain and chief mate.

With regard to the *quantity* and *measure* of proof, but few observations are requisite. It is for the parties, according to their own discretion, to procure such evidence as the circumstances of the case may supply; and it is for the jury to decide upon its effect. The law rarely interferes as to the measure of proof; and the sufficiency cannot, in the nature of things, be subject to legal definition or control.^b All that can be done is to intercept such evidence as would tend to prejudice or mislead; this being done, the law confides in the good sense and integrity of the jury. Neither is there any order in which evidence must be given; as to the order in which a party brings forward his proofs, he is guided by his own discretion.ⁱ In some few instances, however, the law interferes as to the *number* of witnesses.^j

^b Quæ argumenta ad quem modum probandæ cuique rei sufficient, nullo certo modo satis definiri potest.

ⁱ *R. v. Turner*, 2 C. & K. 735, per Erle, J., E. C. L. R. 61.

^j It seems that in equity no decree can be made on the oath of one witness against the defendant's answer on oath; *Story's Eq. Jur.* 1528. But circumstances may be equivalent to the testimony of any single witness; *Ibid.*; 3 Ch. C. 123, 69. And formerly one witness was not sufficient against the husband, although it was supported by the answer of the wife, for she could not be a witness against her

*As in the case of high treason, when it works corruption of blood; there two witnesses are necessary by the express [*734 provision of the statute law.^k So, in the case of perjury, two witnesses are essential, for otherwise there would be nothing more than the oath of one man against another,^l upon which the jury could not safely convict. In bastardy cases, the statute^m requires the evidence of the mother to be corroborated in some material particular, in order to charge the putative father; and in criminal cases, the judge will generally tell the jury that the evidence of an accomplice ought to be so corroborated, though it is certainly competent for the jury to act on his sole evidence.ⁿ

In other cases the general rule seems to be, that where there is any legal admissible evidence tending to prove the issue, the effect of that evidence is solely for the consideration of the jury.^o

*It is, however, in all cases requisite that the plaintiff [*735 should adduce some *prima facie* evidence in support of every essential allegation. Where there is a failure of evidence, tending to establish any one essential averment, the court directs

husband; 2 Ch. C. 30; *Wrottesely v. Bendish*, 3 P. Wms. 238. But a decree may be made on the evidence of a single witness, where the evidence of the party is falsified; 2 Vern. 554; 2 Atk. 19; 1 Bro. Ch. C. 52.

In general, at common law one witness was in all cases sufficient; *per* Holt, C. J., who said that the authorities cited by Lord Coke to the contrary did not warrant his opinion; Carth. 144; Co. Litt. 6, b. The Spiritual Court, acting upon the rules of the civil law, requires two witnesses; but where temporal matter is pleaded in bar of an ecclesiastical demand, and the evidence of one witness is refused, a prohibition will be awarded. As where an executor proves the payment of a legacy by one witness; *Shatter v. Friend*, Show, 175; Carth. 142.

^k 7 & 8 Will. III. c. 3,

^l Vol. II. tit. PERJURY; *R. v. Yates*, Car & M. 132; E. C. L. R. 41. But it is clear that two witnesses to all the facts for the prosecution are not necessary. It is enough if there be something in the case to make the oath of the prosecutor preferable upon the whole to that of the prisoner; *R. v. Boulter*, 21 L. J., M. C. 57. But there must be such corroboration as to each assignment to justify a conviction upon each; *R. v. Parker*, Car. & M. 639; E. C. L. R. 41; *R. v. Virrier*, 12 Ad. & E. 317; E. C. L. R. 40.

^m 7 & 8 Vict. c. 101; 8 & 9 Vict. c. 10.

ⁿ *R. v. Atwood*, 1 Leach, 464; *R. v. Jones*, 2 Camp. 132; *R. v. Hastings*, 7 C. & P. 152; E. C. L. R. 32; *R. v. Durham*, 1 Leach, 479. There are, however, some offences to which this rule would not be applicable; *R. v. Jarvis*, 2 M & Rob. 40; *R. v. Hargrave*, 5 C. & P. 170; E. C. L. R. 24. As to the necessity for the corroboration being of some particular material to the charge, see *R. v. Addis*, 6 C. & P. 388; E. C. L. R. 25; *R. v. Webb*, 6 C. & P. 595; E. C. L. R. 25.

^o Vol. II. tit., CONVICTION.

an acquittal in a criminal, or directs the plaintiff to be 'nonsuited in a civil, case. But, in civil actions, if there be any evidence, however weak, tending to the proof of the issue, the plaintiff may, by appearing when he is called, have his case submitted to the consideration of the jury; but if there should be no evidence tending to prove any one essential fact, the jury would be directed to give a verdict against him, by which he would be absolutely and finally concluded.

No evidence is requisite to prove the existence of a fact which must have happened according to the constant and invariable course of nature,³ or to prove any general law:⁴ nor is it necessary

³ See Lord Ellenborough's observations, *R. v. Luffe*, 8 East, 201.

⁴ *Facile patet non indigere probatione jus commune, quod judici jam notum esse censetur*; Heinecc. El. J. C. 443. The courts notice the contents of all public Acts; *Reniger v. Fogossa*, Plow. 12; 81, a, 83, b; including all facts recited or stated in them; *R. v. Lutton*, 4 M. & S. 332; and the true title of them; *Beck v. Beverly*, 11 M. & W. 845; *Holland's case*, 4 Co. 75. Of such as relate to trade in general; *Kirk v. Nowill*, 1 T. R. 124; but not of a statute relating to a private trade only; *Ib.* But if a statute, private in its nature, gives a forfeiture to the King, it is a public Act; *R. v. Buggs*, Skin. 428; and if an Act relate to a public highway, it is so far a public Act; *ante*, p. 275. And the courts must now, by 8 & 9 Vict. c. 113, s. 31, (*ante*, p. 277,) receive as evidence copies of private, and local and personal acts, purporting to be printed by the Queen's printers.

So, the courts will notice all other general laws, as that every corporation has a right of removing one of its members; *R. v. Lyme Regis*, Doug. 149. The privileges of the King's Palaces; *R. v. Elderton*, Lord Raym. 980. And all privileges of the Crown; *Ib.* The Ecclesiastical Law; 1 Roll. Abr. 526; 6 Vin. Abr. 496; and the Admiralty Law; *Ib.*

The commencement of the sessions of Parliament; *Partridge v. Strange*, Plowd. 84; *R. v. Wilde*, 1 Lev. 216; *Spring v. Eve*, 2 Mod. 240; *Birt v. Rothwell*, Lord Raym. 343; Moor, 551; the session in which a statute was passed, and the year of the reign; *R. v. Biers*, 1 A. & E. 327; E. C. L. R. 28; *Gibbs v. Pike*, 8 M. & W. 223; the place of holding Parliament on a particular day; *Birt v. Rothwell*, Lord Raym. 210; the prorogation of Parliament; 1 Lev. 296, *supra*; the course of proceedings in Parliament, whether before one of the Houses, or before a Committee; *Lake v. King*, 1 Saund. 131. The Journals of either House were not judicially noticed; *R. v. Knollys*, 1 Lord Raym. 15; but by 8 & 9 Vict. c. 113, s. 3, copies of them, purporting to be printed by the Queen's printers, or the printer of either House, must be received; *supra*, p. 281.

So the courts will take notice of all courts of general jurisdiction, and their proceedings; *Dobson v. Bell*, 2 Lev. 176; as of the Court of Chancery; *Weaver v. Clifford*, Cro. J. 3; *Worlich v. Massy*, Cro. Jac. 67; and the other courts at Westminster; *Lane's case*, 2 Co. 16, b; *Mounson v. Bourn*, Cro. Car. 526; W. Jones, 417; *H. Slade's case*, 4 Co. 93, b. The proceedings of the County Palatine Courts; *Peacock v. Bell*, 1 Saund. 73. Of the courts in Wales; *Broughton v. Randall*, Cro. Eliz. 502; *Gryffyth v. Jenkins*, Cro. Car. 179. Of the Prero-

to prove any general customs *of the realm,^r or any artificial regulation prescribed by *public and com- [*736 *737

gative Court of the Archbishop of Canterbury; *Shelton v. Cross*, 1 Ford, 466, *sed quære*. But they do not notice the mere practice of other courts, thus the practice of the Court of Chancery; *In re Clarke*, 2 Q. B. 619; E. C. L. R. 42; *Dicas v. Lord Brougham*, 1 M. & Rob. 312; and of the Ecclesiastical Courts is a matter of fact to be proved by witnesses; *Beaurain v. Sir W. Scott*, 3 Camp. C. 388; *Tucker v. Inman*, 4 M. & G. 1049; E. C. L. R. 43; so is that of the Insolvent Court; *R. v. Koops*, 6 A. & E. 198; E. C. L. R. 33; and of the Bankruptcy Court; *Van Sandau v. Turner*, 6 Q. B. 773; E. C. L. R. 51.

The courts will notice what courts possess a general jurisdiction; *Tregany v. Fletcher*, Ld. Raym. 154; *Peacock v. Bell*, 1 Saund. 73; 1 Sid. 340. And the limits of their jurisdiction; 2 Inst. 557. And their officers; *Ogle v. Norcliffe*, Ld. Raym. 869; see *Dillon v. Harpur*, Ld. Raym. 898. But they do not take judicial notice of the nature and extent of inferior courts; *Moravia v. Sloper*, Willes, 37; nor of the proceedings of inferior courts; *R. v. Chancellor of Cambridge*, Ld. Raym. 1334; nor of any particular jurisdiction, as of a dean and chapter to induct; Bro. Presentation al Eglise, pl. 13, Office, pl. 2; nor that the lord of a particular franchise has the return of writs; Bro. Office, pl. 2; nor of a particular liberty; March. 125; nor of the Cinque Ports; 2 Inst. 557; nor of an entry in the sheriff's book, referred to by an affidavit; *Russell v. Dickson*, 6 Bing. 442; E. C. L. R. 19. Nor foreign laws; *Mostyn v. Fabrigas*, Cowp. 174. Nor laws of Scotland; *Woodham v. Edwards*, 5 A. & E. 771; E. C. L. R. 31. Nor the laws of the plantations abroad; *Wey v. Fally*, 6 Mod. 195. Nor the seal of a foreign court; *Henry v. Adey*, 3 East, 221; *Black v. Lord Braybrooke*, 2 Stark. C. 7; E. C. L. R. 3; *R. v. Bathwick*, 2 B. & Ad. 639; E. C. L. R. 22. But they take judicial notice of the laws of Ireland; *Hunter v. Potts*, 4 T. R. 194; *Reynolds v. Fenton*, 3 C. B. 191; E. C. L. R. 54; and that the common law prevails there; *R. v. Nesbitt*, 2 D. & L. 529; *per* Patteson, J.

So, every court will notice the records of its own court, but not deeds enrolled, for these are merely the private acts of the parties, authenticated in court; nor the letters patent of another court; *Wymark's case*, 5 Co. 74, b.; Bac. Abr. Ev. F.

The House of Lords, in a committee of privileges, even admitted an entry in their journals as evidence of the limitations, in a patent, without requiring the production of the patent; *Lord Dufferin and Clandeboyne's claim*, 4 Cl. & F. 568.

^r As the custom of merchants, *Williams v. Williams*, Carth. 269; *Carter v. Downish*, *ib.* 83; *Pinkney v. Hall*, Ld. Raym. 175; *Erskine v. Murray*, Ld. Raym. 1542; *Brandao v. Barnett*, 3 B. C. 519; E. C. L. R. 54; 12 Cl. & F. 787; the customs of gavelkind and Borough-English; *Clements v. Scudamore*, Ld. Raym. 1025; Co. Litt. 175; *Launder v. Brooks*, Cro. Car. 562.

But peculiarities not essential to tenures; 1 Sid. 138; *Brown v. Ricks*, 2 Sid. 153; *Launder v. Brooks*, Cro. Car. 562; such as a custom to devise; 2 Sid. 153; or a gavelkind custom to hold by the curtesy, although the wife has no issue; 1 Sid. 138; 2 Sid. 153; nor particular local customs; *Spink v. Tenant*, 1 Roll. R. 105; *Blacquiere v. Hawkins*, Doug. 378; such as that of foreign attachment in London; 1 Roll. 105, *supra*; or of carting whores; *Stainton v. Jones*, Doug.

*738] petent authority; such as the ordinary *computation of time by the calendar;^a or the known divisions of the kingdom;^a or any public matters recited in Acts of Parliament,^a royal procla-

380, note; *Argyle v. Hunt*, Str. 187; or that none but freemen of London are admissible into the livery of a company; *Piper v. Chappell*, 14 M. & W. 624, must be proved. But the customs of London are noticed in the city courts; Doug. 380; and by the courts at Westminster, after they have been certified; *Blacquiére v. Hawkins*, Doug. 380. But *semble*, the courts take notice of such customs only as have been certified to themselves; *Piper v. Chappell*, 14 M. & W. 649; and as to the certificate, see *Crosby v. Hetherington*, 4 M. & G. 933; E. C. L. R. 43. The custom of the city, that every shop is a market overt, was certified by Sir E. Coke, 3 Co. 83. The custom of foreign attachment was certified by Starkie, recorder of that city, 22 Edw. IV.; Doug. 379; 1 Rol. Abr. 554. The custom of a feme covert being sole trader is also noticed; *Lavie v. Phillips*, Burr. 1784. And the distribution of the property of intestate freemen of London; *Bruin v. Knott*, 12 Sim. 452.

^a *Hoyle v. Cornwallis*, Stra. 387; *Brough v. Parkings*, Ld. Raym. 992; 2 & 3 Edw. VI. c. 1; 5 & 6 Edw. VI. c. 1; 24 Geo. II. c. 23. The fasts and festivals appointed by the calendar; *Brough v. Perkins*, 6 Mod. 80; *R. v. Justices of Ipswich*, 2 Ford. 280; *Harvy v. Broad*, Salk. 626. The number of days in a particular month; 1 Roll. Abr. 524. The coincidence of the day of the week with that of the year; *Page v. Faucet*, Cro. Eliz. 227; *Smith v. Boucher*, Ann. 64. That a particular day is a Sunday; *Hanson v. Shackelton*, 4 D. P. C. 8. But not of the hours, as of the time of sunset; *Collier v. Nokes*, 2 C. & K. 1012; E. C. L. R. 61. So they will notice the beginning and end of term; *Austin v. Bewley*, Cro. J. 548; *Thomson v. Southwell*, 12 Mod. 647; *Dobson v. Bell*, 2 Lev. 176.

^a The courts will notice the known divisions of the kingdom into counties; *R. v. Sharpe*, 8 C. & P. 436; E. C. L. R. 34; but not the local situation of places within particular counties, or the distance of counties from each other; *Deybel's case*, 4 B. & Ald. 243; E. C. L. R. 6; nor the division of counties, unless described by statute; *R. v. Bourne*, Burr. S. C. 42; 2 & 3 Will. IV. c. 64. Also, counties, inferior counties; March. 125; 2 Inst. 557. That a county is co-extensive with a particular town; *R. v. Baker*, 18 & 19 Geo. II. Also, the ecclesiastical divisions of the kingdom: *Adams v. Terre-tenants of Savage*, 2 Ld. Raym. 854. But not the situation of liberties, vills, or hamlets; 2 Inst. 557; *R. v. Greep*, Comb. 459; nor that a place is in a particular county, as that the Tower is in London; *Brown v. Thompson*, 2 Q. B. 789; E. C. L. R. 42; *Humphreys v. Budd*, 9 D. P. C. 1000; nor that a town is in a particular diocese; *R. v. Sympton*, 2 Ld. Raym. 1379; Str. 609. So, the courts will notice the extent of a port; *Fazakerley v. Wiltshire*, Str. 469; and of incorporated towns; *R. v. Blacksmith's Company*, Mich. 4 Geo. II.

The court will not notice without an averment, that Dublin, mentioned in a bill of exchange, is Dublin in Ireland; *Kearney v. King*, 2 B. & Ald. 301. Of course they will not notice the distance of streets in London from one another, although they are well known; *Kirby v. Hickson*, 1 L. M. & P. 364; nor that a particular street is a thoroughfare; *Grant v. Moser*, 5 M. & G. 129; E. C. L. R. 44.

^a As of a war with France, the war being mentioned in several statutes; *R. v. De Berenger*, 3 M. & S. 67; and see *supra*, p. 278.

mations,* or other *public documents, published by competent authority:† nor is evidence necessary to prove the time of the accession of the sovereign; or his death;‡ the privileges of the royal palace;§ or the great and privy seals.¶ So, the courts will take judicial notice of the seals of the superior courts,‡ including the courts of the counties palatine;§ of the Ecclesiastical Courts;¶ of the High Court of Admiralty;‡ of the Court of Bankruptcy;§ of the Insolvent Court;‡ of the new County Courts;‡ of the Court of the Vice-Warden of the Stannaries;‡ of the Board of Poor Law Commissioners;‡ of the Record Office;‡ of the General Registry Office;‡ of the Registrar of Designs' Office;‡ of the seal of the Apothecaries' Company to a certificate of the qualification of an apothecary;‡ and of the corporate seal of the City of London.¶ And it seems that where particular seals are given by Act of Parliament, the courts must take judicial notice of them.

*But the courts will not take notice without proof of the seals of inferior courts, unless made cognizable by particular statutes; nor of the Irish, colonial, or foreign courts.¶ But now documents which in Ireland are admissible in evidence without proof of seal or signature, shall be received in the courts of England without such proof; and so likewise, documents which are admissible in England without proof of the seal shall be

* *Supra*, p. 281. The court will take judicial notice, as a public matter affecting the government of the country, that an allegation that a revolted colony has been recognized as an independent State by this country is false; *Taylor v. Barclay*, 2 Sim. 213. So they will notice the existence of a foreign State recognized by the government; *Frisarri v. Clement*, 3 Bing. 438; E. C. L. R. 11.

† As the London Gazette, without proof of its having come from the Queen's printer; *R. v. Forsyth*, R. & R. 274, *sed quære*; and see *supra*, pp. 279, 281.

‡ *Holman v. Burrow*, 2 Ld. Raym. 791.

§ *Attorney-General v. Donaldson*, 10 M. & W. 117.

¶ *Supra*, p. 257, *et seq.*

‡ Com. Dig. tit. Evidence, A. 2; *supra*, p. 258.

§ *Olive v. Guin*, 2 Sid. 145.

¶ B. N. P. 247.

‡ *Green v. Waller*, Ld. Raym. 891.

§ 1 & 2 Will. IV. c. 56, ss. 28, 29; 2 & 3 Will. IV. c. 114, s. 9.

¶ 5 & 6 Vict. c. 116.

‡ 9 & 10 Vict. c. 95, see ss. 3, 57, 111.

§ 6 & 7 Will. IV. c. 106, s. 19.

¶ 4 & 5 Will. IV. c. 76, s. 3.

‡ 1 & 2 Vict. c. 94, s. 31.

§ 6 & 7 Will. IV. c. 86, s. 33.

¶ 5 & 6 Vict. c. 100, s. 16; 6 & 7 Vict. c. 65, ss. 6, 7.

‡ 14 & 15 Vict. c. 99, s. 8.

¶ *Doe d. Woodmass v. Mason*, 1 Esp. 53.

¶ *Henry v. Adey*, 3 East, 221; *Buchanan v. Rucker*, 1 Camp. 63; *Clark v. Mullick*, 3 Moo. P. C. R. 252, where it was held that the seals of our courts must be proved in the colonies.

received in Ireland without such proof, and both of these classes^r are also to be admitted in like manner in the colonies. And by the same statute^s all judicial proceedings of any foreign or colonial court, and all legal documents filed or deposited therein, may be proved by a copy purporting to be sealed with the seal of such court; or, if the court has no seal, by a copy purporting to be signed by the judge or one of the judges of such court, such judge stating on such copy that the court has no seal, without further proof. Nor will the courts notice the stamp upon the judge's order;^t nor the seal of the sheriff;^u nor the seal of a corporation, other than of London.^v They also notice the royal sign manual;^w the signatures of the judges of the superior Courts of Law or Equity at Westminster.^x Before this statute, they would only notice the signature of a judge of their own court;^y and also of their own officers.^z So, the courts will of themselves notice the

*741] *meaning of English words,^a terms of art, legal weights and measures, money, the ordinary admeasurement of time.^b

No evidence also is necessary to prove any matter of legal presumption.^c

The nature of legal presumptions will now be considered.

Evidence, as has been seen, is either *direct*, where the witnesses testify as to facts of which they have had actual knowledge; or it is *indirect*, *circumstantial*, or *presumptive*,^d where the fact is not

^r 14 & 15 Vict. c. 99, ss. 9, 10, 11. ^s S. 7.

^t *Barrett Navigation Company v. Shower*, 8 D. P. C. 173.

^u *Bunbury v. Matthews*, 1 Car. & K. 380; E. C. L. R. 41.

^v *Moises v. Thornton*, 8 T. R. 307; *Collins v. Carnegie*, 1 A. & E. 695; E. C. L. R. 28; *Couch v. Goodman*, 2 Q. B. 580; E. C. L. R. 42.

^w *R. v. Miller*, 2 W. Bl. 797.

^x 8 & 9 Vict. c. 113, s. 2.

^y *R. v. Hare*, 13 East, 189.

^z *Howell v. Wilkins*, 7 B. & C. 783; E. C. L. R. 14.

^a See *Angle v. Alexander*, 7 Bing. 119; E. C. L. R. 20.

^b *Hockin v. Cooke*, 4 T. R. 314; *Kearney v. King*, 2 B. & Ald. 301; *R. v. Swatkins*, 4 C. & P. 552; E. C. L. R. 19.

^c According to the civil law, the effect of a legal presumption is "ut a probatione merito immunit sit, qui vel præsumptionem pro se habet vel possessionem." —Heinecc. Pand. 374.

^d The term *presumptive* has been used in this sense by English lawyers, in contradistinction to positive and direct evidence, and consequently as including all evidence whatsoever arising from circumstances, whether conclusive or inconclusive in its nature; see Co. Litt. 6; Staundf. 179: 3 Comm. 371; 17 How. St. Tr. 1430; 1 St. Tr. 181. Lord Coke, when he speaks of violent, probable, and light presumptions (Co. Litt. 6), evidently means, not presumptions in their strict tech-

proved by direct evidence, but is inferred or deduced from one or more other facts, which are directly proved or admitted.

According to this definition, circumstantial or presumptive evidence includes all evidence which is not positive and direct, without regard to its nature, intensity, and degree; whether the fact in issue be a necessary consequence from the circumstances proved, or whether, on the other hand, their tendency to establish the fact may be rebutted by proof to the contrary; whether the inference be made by virtue of some previously known and ascertained connection between the disputed fact and those which are proved, or be a mere deduction of reason, exercised upon the special circumstances of the case, either *with or without the aid of [*742 connections pointed out by experience.

A *presumption* may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, it is necessary that there be a previous experience of the connection between the known and inferred facts, of such a nature, that as soon as the existence of the one is established, admitted, or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject. It also follows, from the above definition, that the inference may be either *certain*, or not certain, but merely *probable*, and therefore capable of being rebutted by proof to the contrary.

Presumptions thus defined are either *legal and artificial*, or *natural*. They are artificial, or presumptions of law, whenever they derive from the law any technical or artificial operation and effect, beyond their mere natural tendency to produce belief, and operate uniformly, without applying the process of reasoning on which they are founded to the circumstances of the particular case. They are, on the other hand, *natural* where they act merely by virtue of their own natural efficacy. For instance, whenever a particular presumption arises from the lapse of a defined space of time, it is always in its nature artificial; for the evidence, when left to its own natural efficacy, is not confined within arbitrary and artificial boundaries. Thus, at the expiration of twenty years, without payment of interest on a bond,^e or other acknowledgment of its existence, satisfaction was to be presumed; but if a single day nical sense, but presumptive or circumstantial evidence. And see the able work of Mr. Best "On Presumptions."

^e Before the 3 & 4 Will. IV. c. 42.

less than twenty years had elapsed, the presumption of satisfaction from mere lapse of time did not arise. This is obviously an artificial and arbitrary distinction. No man's mind is so constituted that the mere lapse of the single day which completes the twenty *743] years would absolutely* generate in it a conviction or belief that the debt had been satisfied. But again; satisfaction may be inferred from the lapse of a shorter period, if it be rendered probable by other circumstances; for instance, from the lapse of nineteen years; here the lapse of time is to be taken into the account by the jury, in estimating the probability, whether, under all the circumstances, the debt has not been satisfied. Here, however, the lapse of time possesses no *artificial* or arbitrary operation, but is left to its mere *natural* tendency, to convince the minds of the jury that the debt has been satisfied.^f

^f As artificial or legal presumptions are founded partly upon principles of policy and utility, independently of the real existence of the fact inferred, and consequently, as such presumptions must occasionally, at least, be made contrary to the real truth, it follows, that these presumptions cannot, consistently with just principles, be established, unless either the real fact be immaterial, as where the presumption is made merely for the purpose of annexing a legal consequence to the fact on which the presumption is founded; or where the fact to be presumed being material, but its investigation difficult and remote, a general rule of presumption can be established of practical convenience, and consistent with justice, although it may occasionally operate contrary to the truth. In the first place, presumptions are frequently made for the mere purpose of annexing a legal incident to a particular predicament of act. If the fact *B.*, to which a particular legal consequence is annexed, be absolutely or conditionally presumed from the existence of the fact *A.*, it is obvious that the effect is to annex to the fact *A.* the legal consequence which belongs to *B.* The making of such presumptions, and thus annexing legal consequences, is an indirect mode of legislation; and in estimating the legal value of such a presumption, it is plain that the intermediate or presumed fact may be left out of the account; the question is, whether a legal consequence be well connected with a particular predicament in fact; in other words, whether a rule of law be wisely constituted. Thus, if from the adverse possession of an incorporeal interest in the lands of another, unanswered, a grant is to be presumed, the effect is to annex ownership as an incident to such adverse possession unanswered; for the supposed grant is mere fiction, or legal machinery, and the only question is, whether the legal consequences really incident to a valid grant are well annexed to such a state of facts.—Again, in trover, a conversion of the plaintiff's property is to be inferred by a jury, from the fact of a demand by the owner, and refusal on the part of the defendant who is in possession of it, such refusal being unexplained. Here, the predicament on which the presumption is built renders the fact presumed in reality immaterial, where the defendant wilfully withholds the plaintiff's property; it is of no importance to the real justice of the case, as between the parties, to what use the defendant may have applied the

**Artificial* or legal presumptions are also of two kinds, immediate and mediate. Immediate are those which are
 *made by the law itself, directly, and without the aid of
 a jury. Mediate presumptions are those which cannot be

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[*745]

property, whether he has consumed the goods, or allowed them to perish in the course of nature. The effect in such cases is merely to annex to one fact a legal incident annexed by law to another fact, to which the former is in all respects equivalent. Such presumptions are also well founded in principle where the investigation of a fact is difficult and precarious, and where a general rule of practical utility can be established, without occasioning positive injustice in individual instances. Within this principle, all statutes of limitation, and the presumptions made in analogy to them, are founded. The difficulty of proving a debt constantly increases with lapse of time, and may at last become impossible; whilst, on the other hand, the probability that he who makes no claim of payment or possession has a right to make it, continually diminishes. Convenience, therefore, requires that at some period or other the presumption should be made, either absolutely or otherwise, against the antiquated claim. And as such a rule or presumption must be general in its operation, a precise and definite period must of course be appointed for its operation. The great advantages of this in point of policy and convenience are of the most obvious nature. The operation of such a rule, whether it be absolute, or be but a *primâ facie* presumption, being purely artificial in its nature, may be, it is true, contrary to the fact; but of this, a party who knew the rule, and who suffers therefore merely from his own laches, has no just ground for complaint. On this ground, by the stat. 1 Jac. I. c. 11, s. 2, 19 Car. II. c. 6, a person who has been abroad for the space of seven years, and has not been heard of within that time, is, at the expiration of it, presumed to be dead; a rule of convenience, on account of the difficulty of proving the death of a person under such circumstances, and attended with no positive injustice in any individual case, the presumption operating only in the absence of proof to the contrary. On the same principle were founded the decisions of the Roman law in those nice cases which sometimes happen, where it is impossible, with any approach to certainty, to decide which of two persons, who died very nearly at the same time, survived the other. *Cum bello pater cum filio periisset, materque filii quasi postea mortui bona vindicaret, agnati vero patris quasi filius antea periisset, Divus Hadrianus credidit, patrem prius esse mortuum; L. 9, s. 1, ff. de reb. dub. And again, Mulier naufragio cum annicolo filio periit quia verisimile videbatur, ante matrem infantem periisse, virum partem dotis retinere placuit; L. 23, ff. de pac. dot.; see tit. DEATH, Vol. II. In such cases a general rule is preferable to laborious investigation in each individual case, where the result must always be subject to doubt and uncertainty.*

It has been said, that the presumption of the law is better than that of man (*Esprit des Loix*, l. 29, c. 16). A position much too large, if it be not limited to general rules of the nature above alluded to. For artificial presumptions, although beneficial, as general and practical rules, are usually very uncertain and precarious instruments for the investigation of truth in particular instances; they are, therefore, unfit to be employed where any application of the law, contrary to the real fact, would be attended with positive injustice, as in criminal cases. Where facts

*made but by the aid of a jury. Thus, the law itself pre-
 *746] sumes that a bond, or other specialty, was made upon a
 *747] good consideration; but the common law never presumed,
 *from the lapse of twenty years, without any payment of

are not necessarily connected, the connecting of them by means of artificial presumption must sometimes lead to error in fact. Where facts are necessarily or usually connected, technical presumptions are unnecessary; the common sense and experience of mankind will lead them to the proper conclusions, giving to such natural presumptions such weight as experience warrants, confirmed as they are on the one hand, or impeached on the other, by the whole context of circumstances belonging to the case. It is also to be observed, that presumptions which tend to the actual investigation of such facts as are usually the subject of litigation in courts of justice, are of a very general nature, and seldom, if ever, conclusive. Thus presumptions, and strong ones, are constantly founded on a knowledge of mankind; a man's motives are inferred from his acts, and his conduct from the motives by which he was known to be influenced; it is presumed, that a rational agent intended that consequence which his acts naturally tended to accomplish; that he consults his own interests; that if he pays or acknowledges a debt, it is really due; that if he admits himself to be guilty of a crime, the admission is true; that he does not commit a crime, or do any other act which tends to his prejudice, without a motive. Presumptions of this nature, in almost every case of circumstantial evidence, afford a light which may be considered to be absolutely essential to the discovery of truth; but then they operate simply by their own intrinsic efficacy, as ascertained by experience, and never so conclusively as to form the basis of an artificial rule which is to operate invariably. All natural presumptions are founded in experience; but so infinitely are the transactions of mankind complicated and varied, that such an experience of the necessary or even ordinary connection between particular facts as will serve for the basis of a *prima facie* presumption, still less of a conclusive inference, is unattainable, even in the most simple instances. So far is experience from warranting such presumptions, that it evinces their inefficacy by showing that a general presumption would frequently be a fallacious one. There is no subject for presumption of more ordinary occurrence than is afforded by the prisoner's recent possession of stolen goods, on prosecutions for larceny; no facts, perhaps, are more closely and usually combined, in legal experience, than is the fact of such recent possession of the property by the prisoner, with the fact that he stole it; yet this connection, although usual, is by no means necessary, as experience proves; no artificial presumption can therefore be founded on such a connection; the law, it is true, recognizes it, and the judge usually comments upon its nature and force; but no artificial weight or importance is annexed to it, and the juries do not convict unless they are fully satisfied and convinced of the actual guilt of the prisoner. Artificial presumptions, therefore, can never be safely established as a means of proof in a criminal case. To convict an innocent man is an act of positive injustice, which, according to one of the best and most humane principles of our law, cannot be expiated by the conviction of an hundred criminals who might otherwise have escaped; 2 Hale, 289. From such presumptions the common law is justly most abhorrent; and happily our statute book has not been disgraced by many violations of the humane

interest on a bond, or acknowledgment of its existence, that it had been satisfied; that presumption was left to a jury. Presumptions may therefore be divided^g into three classes: 1st. Legal presumptions made by the law itself, or presumptions of *mere law*. 2dly. *Legal* presumptions made by a jury, or presumptions of *law and fact*. 3dly. Mere *natural* presumptions, or presumptions of *mere fact*.

First. Presumptions of *mere law*, are either absolute and conclusive, which correspond with the *præsumptiones juris et de jure* of the Roman law; or, like the *præsumptiones juris* of the Roman law, they may be rebutted by evidence to the contrary. Thus, the presumption of law, that a bond or other specialty was executed upon a good consideration, cannot be rebutted by evidence;^h but although the law also presumes, or intends, that a bill of exchange was accepted on a good consideration, that presumption may be rebutted by proof to the contrary. Thus, also, it is a presumption not to be rebutted, that a child under fourteen *cannot commit a rape,ⁱ and that an infant under seven cannot commit felony.^k [*748]

Artificial presumptions, made by the law itself, are not in general principles of the common law in this respect. The abominable and sanguinary enactments of the statute of James the First (21 Jac. I. c. 27), which made the concealment of a bastard child by the mother, evidence that she murdered it, no longer exists. But it is impossible, without a feeling of indignation, to recollect that such a statute did exist as the law of this country for nearly two centuries; the natural effect of which was to leave a court and jury no other alternative than either to violate their oaths, or to execute one for murder whom in their consciences they believed to be innocent.

^g So according to the Roman law, "*Præsumptio conjectura est ducta ab eo quod ut plurimum fit. Ea vel a Lege inducitur, vel a Judice. Quæ ab ipsâ lege inducitur vel ita comparata est ut probationem contrarii haud admittat vel ut eadem possit elidi. Priorem doctores præsumptionem juris adpellant. Quæ a judice inducitur conjectura præsumptio hominis adpellari solet, et semper admittit probationem contrarii quamvis si alicujus momenti sit probandi onere relevet;*" Heineccius El. J. C., p. 4, s. 122.

^h *Lowe v. Peers*, 4 Burr. 2225; *i. e.* so long as the deed remains unimpeached; a bond or other specialty may be directly impeached, on the ground of fraud; and then the consideration may become the subject of inquiry; but whilst the legal existence of the deed stands admitted, the presumption of a good consideration is peremptory and absolute. After a verdict for the plaintiff, or defendant, the Court will presume all things necessary to support the declaration or plea; *Sweetapple v. Jesse*, 5 B. & Ad. 27; E. C. L. R. 27; *Harris v. Goodwyn*, 2 M. & G. 405; E. C. L. R. 40; see *Stennel v. Hogg*, 1 Wms. Saund. 228, note.

ⁱ *R. v. Groombridge*, 7 C. & P. 582; E. C. L. R. 32.

^k 4 Bl. Com. 23.

eral used as rules of evidence for the purpose of ascertaining doubted facts; but are, in effect, mere arbitrary rules of law, which, according to the policy of the law, operates in some instances conclusively, and which, in other instances again, where a peremptory and absolute operation would be attended with inconvenience, may be answered and rebutted. The connection between mere natural facts cannot be known, but from actual observation and experience; but purely artificial relations, such as legal incidents and consequences, the mere creatures of positive law, may be indissolubly tied and connected together by the rules of law. A law, or rule of law, consists in nothing more than the connecting of certain consequences with particular defined predicaments of fact. When, therefore, the law presumes or infers any fact to which a legal consequence is annexed, from any defined predicament of facts, the law in effect indirectly annexes to that predicament the legal consequences which belongs to the presumed fact.¹

Again; in many instances presumptions of law are but *prima facie* inferences or *intendments*, made by the courts, liable to be rebutted by proof to the contrary. Thus, the law will intend, or imply, that the heir at law of an ancestor, who died seised of an estate, was in possession;^m or where a fine has been levied, will imply that it has been levied with proclamations;ⁿ or that the examination of *a prisoner, under a charge of felony, has been taken
*749] in writing,^o until the contrary of these facts be proved. Presumptions of this nature may be rebutted not only by evidence to the contrary, but also by contrary presumptions or intendments of law. Thus, on an indictment for the non-repair of a road, the presumption that an award in relief of the defendants was duly made according to the directions of an inclosure act, may be rebutted by proof of repairs subsequently done to the road by the defendants.^p

¹ *Supra*, p. 743, note (f).

^m Watkins on Descents, ch. 1, p. 35.

ⁿ 3 Co. 86, b. But if the intendment be rebutted, proclamations must be proved, in order to bar a stranger; B. N. P. 229. The acceptance of rent from a third person is not a ground for presuming a surrender; *Copeland v. Watts and another, Executors of Gubbins*, 1 Stark. C. 95; E. C. L. R. 2. The nonproduction of books upon notice, merely entitles the opposite parties to give secondary evidence. It does not authorise the jury to speculate upon the probable contents; *Cooper and another v. Gibbons*, 3 Camp. C. 363.

^o Tit. ADMISSIONS.

^p *R. v. Inhabitants of Haslingfield*, 2 M. & S. 558.

But the presumption in favour of innocence is, it has been held, too strong to be overcome by an artificial intendment of law.^a

Secondly, Presumptions of *law and fact*.—These are also artificial presumptions which are recognized and warranted by the law as the proper inferences to be made by juries under particular circumstances. These also are founded partly upon principles of policy and convenience, and frequently in analogy to express rules of law; and for this purpose a technical force and efficacy is given to the evidence which warrants such presumption, beyond its mere natural tendency to convince the mind. Two incidents are essential to presumptions of this class: 1st. The inference cannot be made by the court, but ought to be made by the jury. 2ndly. The inference is never conclusive.

Presumptions, therefore, of this kind are very closely allied to those artificial presumptions which are made by the law itself, but which are in their nature inconclusive, that is, to the *præsumptiones juris* of the Roman law.^r They are of a class intermediate between mere *artificial** presumptions made by the law itself, and mere *natural* presumptions, which are to be made exclusively by [750] a jury. They may, therefore, not improperly be called mixed presumptions, or presumptions of *law and fact*, partaking of the nature of mere *legal* presumptions, in this respect, that they are artificial, and of the nature of mere *natural* presumptions, inasmuch as they must be made, not by the court, but by a jury. The principle and origin of this class of presumptions are usually not remote; they are for the most part instruments in the hands of the courts, by which positive statutes, or rules of law, are extended by analogy to cases which do not fall within their express legal operation, or by means of which effect is given to rules of evident policy and convenience, which cannot be applied directly.^s Thus, a jury is required, or at least advised, by the court, to infer a grant of an incorporeal hereditament after an adverse enjoyment for the space of twenty years unanswered.^t This is done in analogy to the Statute of Limitations, 21 Jac. I.; for as an adverse possession of twenty years is

^a *R. v. Twynning*, 2 B. & Ald. 386; and see as to the presumption that a legal duty was performed; *R. v. Whiston*, 4 M. & G. 607; E. C. L. R. 43; *R. v. Witney*, 5 A. & E. 191; E. C. L. R. 31.

^r *Supra*, p. 747, note (g).

^s For instances of the latter description, *vide supra*, note (f).

^t Lord Tenterden's Act, 2 & 3 Will. IV., c. 71, provides fixed periods of limitation in many of these cases; see tit. PRESCRIPTION.

sufficient to confer a title to the possession of the land itself, *à fortiori* it ought to confer a right to an interest arising out of the land; but that Statute of Limitations does not extend to this case, and therefore the benefit and convenience of such a limitation was obtained indirectly, by thus raising an artificial presumption." Presumptions of this nature, which depend merely on acquiescence for *751] a specific and definite period of *time, of arbitrary appointment, are most obviously artificial; their operation may depend on the lapse of a few hours. more or less.

So, in the case of trover; an unqualified refusal to deliver up the goods on demand made by the owner, does not fall within any definition of a conversion; but inasmuch as the detention is attended with all the evils of a conversion to the owner, the law makes it, in its effects and consequences, equivalent to a conversion, by directing or advising the jury to infer a conversion from the facts of demand and refusal.

Thirdly. Natural presumptions, or presumptions of *mere fact*.—These depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections which are pointed out by experience;† they are wholly independent of any artificial legal relations and connections, and differ from presumptions of mere law in this essential respect, that those depend upon, or rather are, a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, from the course of nature and the ordinary habits of society. Such presumptions are, therefore, wholly independent of the system of laws to be applied to the facts when established; they remain the same in their nature and operation, whether the law of England, or the code of Justinian, is to decide upon the legal effect and quality of the facts when found.

Many presumptions of this class are recognized by the law, and

† The presumption that a bond had been satisfied after the expiration of twenty years from the time when interest had been paid, or other acknowledgment made of its existence, was built on the same principle; *vide supra*, pp. 742, 743; and see *Searle v. Lord Barrington*, 2 Str. 826; 2 Ld. Raym. 1370; *Turner v. Crisp*, 2 Str. 827; *Moreland v. Bennett*, Str. 652; *Washington v. Brymer*, Peake's Adv. C. 201. This case is now provided for by 3 & 4 Will. IV., c. 42, s. 3, which establishes this period of limitation.

‡ These, no doubt, form the basis of numerous legal presumptions. Thus it is presumed that a party will adopt acts done for his benefit; *Bailey v. Culverwell*, 8 B. & C. 448; E. C. L. R. 15.

therefore, in one sense, may be termed legal presumptions, which still, unless some degree of technical force and weight be given them beyond their mere natural operation, are properly to be ranked in this class. The recent possession of stolen goods, on a trial for larceny, is *recognized by the law as affording a presumption of guilt; and, therefore, in one sense, is a pre- [*752
 sumption of law, but it is still, in effect, a mere natural presumption; for, although the circumstance may weigh greatly with a jury, it is to operate solely by its own natural force, for a jury are not to convict on this or any other charge, unless they be actually convinced in their consciences of the truth of the fact. Such a presumption is therefore essentially different from the legal presumptions in fact lately adverted to, where the jury were to infer that a bond had or had not been satisfied, as a few days or even hours, more or less, had elapsed.

Although it be the peculiar province of a jury to deal with presumptions of this description, and to make such inferences as their experience warrants, yet in some instances, where particular facts are inseparably connected according to the usual course and order of nature, and the interposition of a jury would be nugatory, the courts themselves will draw the inference. Thus, on a question of bastardy, where the child has been born within a few weeks after the access of the husband, the bastardy of the child will be inferred without the aid of a jury.⁷

Presumptions of this nature are, as has already been observed, co-extensive with the experience of mankind; there is in fact no relation whatsoever, whether natural or artificial, subject to human observation, which may not be proved, where such proof is material, in a court of justice, by the testimony of those who have had experience of that relation.

A mere *presumption*, in the proper and technical sense of the word, is much more limited in its nature than presumptive or circumstantial evidence in general. A presumption, strictly speaking, results from a previously known and ascertained connection between the presumed fact and the fact from which the inference is made, *without the intervention of any act of reason in the indi- [*753
 vidual instance; on the other hand, circumstantial evidence, that is, indirect evidence to prove a fact, may depend wholly on a process of reasoning applied to the facts of the particular case,

⁷ *R. v. Luffe*, 8 East, 193.

although the mind may never have experienced such a combination before. The instance put by Lord Coke,^{*} of what he terms a violent presumption, is, in reality, a case of indirect or circumstantial evidence, but not properly presumption in the strict sense of the word, because the inference results from an act of reason, exercised upon the facts, and not upon any known and ascertained relations. The instance which he gives of a violent presumption is this: "where a man is found suddenly dead in a room, and another is found running out of that room with a bloody sword in his hand." It is plain that in such a case conviction is wrought by an exercise of the reason upon the circumstances (however small the effort) by which the mind, upon the slightest reflection, excludes all guilty agents but one: the excluding force and nature of the circumstances generate conviction by negating, to the satisfaction of the mind, the agency of any, but one, individual. It is evident that a witness who had never seen such a transaction before would as readily come to the proper conclusion, as one who had actually had experience of similar facts; and subsequently that reason, and not any previous experience of similar associations, supplies the inference.

In practice, however, it rarely happens that some natural presumption, properly so called, does not co-operate with the exercise of reason on the particular circumstances to produce conviction. And on the other hand, those transactions which are the subject of judicial inquiry, and indeed all human dealings, present such an infinite variety of circumstances, that experience alone, however essential and important as undoubtedly it is, in supplying inferences *754] **which tend to the general conclusion, can rarely simply and alone, without the aid of sound reason and discretion exercised upon all the circumstances, warrant a conclusion. It follows, that further remarks on mere natural presumptions belong properly to the head of circumstantial evidence.*

It seems to be a general rule, that wherever there is evidence on which a jury has founded a presumption according to the justice of the case, the courts will not grant a new trial. In an action on a promissory note, given to the plaintiff by the defendant, in consideration of the plaintiff's marrying his daughter; the defence was that the marriage was not a legal one, the plaintiff having married the daughter when he was under age, and without the consent of his parents or guardian. It also appeared, that when

^{*} Co. Litt. 6.

the plaintiff came of age, the wife was lying on her death-bed, and that she died in three weeks afterwards. The jury nevertheless presumed a subsequent legal marriage, and the court afterwards refused to set aside the verdict.^a But it must be borne in mind that there is a strong legal presumption in favor of marriage.^b

Many of the presumptions which are recognized by the law are noticed under the particular subject of evidence to *which they belong;^c it may, however, be proper to advert to some [*755 of the most general.

The law of England, as well as the civil law, presumes against fraud, "*odiosa et inhonesta non sunt in lege præsumenda, et in facto quod in se habet et bonum, et malum, magis de bono, quam de malo, præsumendum est.*"^d Thus, where bankers had been in the habit of discounting bills for a person, who on one occasion sent his clerk with the bill on which the action was brought to inform them that his taking the bill from the plaintiff would depend upon their discounting it, and to inquire whether they would discount it, and they, without giving any answer to the clerk, afterwards placed the bill to his credit; in an action of trover against them for the bill, it was held that they must be presumed to be *bona fide* holders, and also that they had acted honestly, and consequently it could not be presumed that the clerk had delivered the message.^e Upon this principle the law always presumes in favor of innocence, as that a man's character is good until the contrary appear, or that he is innocent of an offence imputed to him till his guilt be proved. Were a woman married again within the space of twelve months after her husband

^a *Wilkinson v. Payne*, 4 T. R. 468. Lord Kenyon, in that case, said the rule was carried so far that he remembered an instance of it bordering on the ridiculous; where, in an action on the game laws, it was suggested that the gun with which the defendant fired was not charged with shot, but that the bird might have died in consequence of fright; and the jury having found for the defendant, the Court refused to grant a new trial; see also *Standen v. Standen*, cited 4 T. R. 469; where a marriage was presumed, although there was strong evidence to show that there had not been time enough for a publication of banns three times. It may, however, be very questionable whether such decisions are not only contrary to sound policy, but even positively mischievous. Do they not afford temptation to juries, in hard cases, to trifle with the sacred obligation of an oath? And the old rule cannot now be supported; see, *per Parke, B., Doe v. Davies*, 2 M. & W 511; and tit. NEW TRIAL.

^b See *Piers v. Piers*, 2 H. of L. Cases, 331.

^c See tit. INTENTION—PRESCRIPTION—CUSTOM.

^d 10 Co. 56; and see *Nickels v. Ross*, 8 C. B. 704; E. C. L. R. 65.

^e *Middleton v. Barned*, 4 Ex. 241.

had left the country, the presumption of innocence was held to preponderate over the usual presumption of the continuance of life.⁴

*756] On the other hand, *omnia præsumuntur *contra spoliatorem*.

Thus, if a man tortiously withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage would be adopted.⁵

But in general, where a person is required to do an act, the omission to do which would be criminal, his performance of that act will be intended until the contrary be shown.⁶ And, therefore, where a plaintiff alleged in his declaration that the defendants, who

⁴ *R. v. Twynning*, 2 B. & Ald. 386. But this case has been much commented on in *R. v. Harborne*, 2 Ad. & E. 541; E. C. L. R. 29; where it was held that a man having some years before married one woman, who was shown to have been alive on 17th March, 1831, and another woman on the 11th April in that year, the sessions were justified in presuming the first wife to have been alive and the second marriage void; and Lord Denman, C. J., said that there was no rigid presumption of law without reference to the accompanying circumstances, and the presumption of innocence could not prevail against proof that the first wife was alive shortly before. With respect to the general rule of the presumption of innocence, see *Williams v. The East India Company*, 3 East, 192; *R. v. Hawkins*, 10 East, 211; and *Lord Halifax's case*, *supra*, pp. 593, 594. In *Powell v. Milburn*, 3 Wils. 355; 2 Bl. 851; upon the trial of an action for money had and received, in order to try the plaintiff's right to a donative, it was held that it was unnecessary for him to prove at the trial, although called upon to do so, that he had subscribed the articles of the church, in the presence of the ordinary, or publicly read the same, or that he had subscribed the declaration of uniformity contained in the stat. 13 & 14 Charles II., c. 4. And the case of *Monke v. Butler*, 1 Roll. R. 83, was cited as a strong one. Monke sued for tithes; the defendant pleaded that the plaintiff had not read the articles according to the statute, and the Court constrained the defendant to prove the negative; and Coke said, that if such a matter should come before him in evidence, he would presume, until the contrary should be proved, that the plaintiff had read the articles. And in *Clayton's Rep. Pleas of Assize*, fol. 48, pl. 83, where the plaintiff sued for tithes under the statute Edw. VI., it was held that the plaintiff should not be put to prove admission, institution and induction; and that if it was otherwise, the defendant might prove it. And in ejectment by a rector or vicar, it is not necessary to prove that he was in orders, for, according to Lord Holt, having established his temporal title, his religious or political title was to be presumed; *Dr. Harcol's case*, Comb. 202. And in *R. v. Coombs*, Comb. 57, the defendant having sworn an affirmative for which an information was filed against him, the Court directed that the prosecutor should first give probable evidence of the negative, and that the defendant should afterwards prove the affirmative if he could.

⁵ *Armory v. Delamirie*, 1 Strange, 504; 1 Smith, L. C. 151, and the notes; *Lord Melville's case*, 29 How. St. Tr. 1194.

⁶ 3 East, 192; and *per* Lord Ellenborough, *R. v. Inhabitants of Hastingfield*, 2 M. & S. 561.

were the charterers of his ship, had put on board a very dangerous and *combustible commodity (in consequence of which a loss [757 happened), without giving due notice to the captain or other person employed in the navigation of the vessel, it was held to be incumbent on the plaintiff to prove his averment.ⁱ But when an act, which in its nature is criminal, has once been proved, the law frequently infers malice, and requires exculpatory proof from the party. Thus in case of homicide, after proof that the prisoner killed the deceased, the law will presume malice, until the prisoner justify or extenuate the act.^k So if a man hold a market near to the legal market of another, and on the same day, the former will be intended to be a nuisance.^l And it is presumed to be a nuisance, where there is an ancient ferry from *A.* to *B.* leading to a public highway, to carry passengers from *A.* to *C.*, a short distance from *B.*, from whence they pass to the same highway.^m

It is also a maxim of law, in principle nearly allied to the former, that "*omnia præsumuntur rite et solenniter esse acta, donec probetur in contrarium.*"ⁿ Thus it will be resumed that a man who has acted in a public office or situation was duly appointed.^o

ⁱ *Williams v. The East India Company*, 3 East, 192, *supra*, p. 732.

^k Fost. 290.

^l *Yard v. Ford*, 2 Wms. Saund. 172; F. N. B. 184; and see *In re. Islington Market Bill*, 12 M. & W. 20, note.

^m F. N. B. 180; *Huzzey v. Field*, 2 C. M. & R. 432.

ⁿ Co. Litt. 232. In *Van Omeron v. Dowick*, 2 Camp. 44, on proof that exported articles, which were contraband of war, had been entered at the customs, Lord Ellenborough presumed a license to export them; and in a case against a carrier, for loss of goods to be carried from Dublin to Liverpool, the importation of which was illegal, and consequently the contract with the carrier void unless they were entered at the custom-house, it was held that it lay on the defendant to prove that they were not entered, for the presumption is, that a party complies with the law; *Sissons v. Dixon*, 5 B. & C. 758; E. C. L. R. 11; and see *Rodwell v. Redge*, 1 C. & P. 220; E. C. L. R. 12; *Doe d. Phillips v. Evans*, 1 C. & M. 461, *infra*, p. 760; *Doe v. Gore*, 2 M. & W. 320; *Manning v. Eastern Counties R. Co.*, 1 M. & W. 237; *R. v. Whiston*, 4 Ad. & E. 607; E. C. L. R. 31.

^o See instances, *supra*, p. 646; *R. v. Verelst*, 3 Camp. 432; although the officer be acting under a special authority, different from the ordinary course of his office, given him by virtue of a particular statute; *Marshall v. Lamb*, 5 Q. B. 115; E. C. L. R. 48. Where, in an action by an attorney for costs incurred in the year 1824 in a suit in the Common Pleas, the defendant proved that the plaintiff had not taken out any certificate in the year 1814 or the four following years, and that he had been admitted an attorney of the King's Bench in the year 1792, but had not since been re-admitted an attorney of that Court, but there was no proof that he had not been re-admitted an attorney in the Court of Common Pleas; it was

*758] Upon proof of title, everything which is collateral to *the title will be intended without proof; for although the law requires exactness in the derivation of a title, yet when that has once been proved, all collateral circumstances will be presumed in favor of right.^p

*759] *If therefore a man declare upon a grant or feoffment, attornment will be intended,^q even although a deed be essential to such collateral matter *ex provisione hominis*, for this is but the private act of the parties, and is not allowed to control the

held, that the plaintiff's acting as an attorney afforded *primâ facie* evidence that he was then an attorney of the Court of C. P., and that it lay on the defendant to show that he was not an attorney of that Court when the business was done; *Pearce v. Whale*, 5 B. & C. 38; E. C. L. R. 11; and see further, *Bevan v. Williams*, 3 T. R. 635; and *infra*, tit. OFFICER. It would seem that this principle does not apply, where the officer is suing for his own benefit; *Smith v. Cartwright*, 20 L. J., Ex. 401. A parish certificate, of the date 1748, was signed only by two churchwardens and two overseers; it appearing from entries in visitation books long before and long after, down to the time in question, that four churchwardens had always been regularly chosen, although in twelve instances, between 1683 and 1829, less than four had been sworn in, and the visitation books for 1747 were lost; and the sessions had refused to *presume* a new and valid appointment of two only for the year of the date of the certificate, the Court confirmed their decision; *R. v. Upton Gray*, 10 B. & C. 807; E. C. L. R. 21.

^p 6 Co. 38; 2 Wms. Saund. 42, *d.* note 7. In ejectment for a term assigned to secure an annuity, the enrolment of the annuity was presumed; *Doe v. Mason*, 3 Camp. 7. Where a deed purporting to have been sealed and delivered is proved to have been signed, it may be presumed to have been sealed and delivered; *Talbot v. Hodson*, 7 Taunt. 251; E. C. L. R. 2. A compensation awarded by a jury for land taken for the purpose of a highway, is presumed to include a compensation for the burthen of holding up the fences; *per* Grose, J., *R. v. Llaudillo*, 2 T. R. 232. A document is presumed to have been made when it bears date, where the document appears to be more than thirty years old; 6 Bing. N. C. 301; E. C. L. R. 37; *Davies v. Lowndes*, 6 M. & G. 528; E. C. L. R. 46; and also even where it is of recent date; *Anderson v. Weston*, 6 Bing. N. C. 296; E. C. L. R. 37; *Smith v. Battens*, 1 M. & Rob. 341; *Doe v. Stillwell*, 8 A. & E. 645; E. C. L. R. 35; *Potez v. Glossop*, 2 Ex. 191; *Sinclair v. Baggaley*, 4 M. & W. 312; *Malpas v. Clements*, 19 L. J., Q. B. 435; *Morgan v. Whitmore*, 6 Ex. 716. But doubt has been expressed in the latter case as to the soundness of this presumption. It is otherwise in an action for criminal conversation, where the letters of the wife to the husband are produced to show the terms on which they lived; there some evidence must be given to show when they were written; *Trelawney v. Coleman*, 1 B. & Ald. 90; *Wilton v. Webster*, 7 C. & P. 198; E. C. L. R. 32; and so where documents are produced to prove the existence at a given time of a debt to support a fiat; *Wright v. Lainson*, 2 M. & W. 739.

^q *Ferrers v. Wignall*, Cro. Eliz. 401. So livery where a feoffment is pleaded is implied; Plowd. 149; 1 Wms. Saund. 228 *a*, note (e).

judgment of the law, which intends all collateral matters.^r But it is otherwise, although the matter be but collateral, if a deed be essential to such collateral matter *ex institutione legis*.^s

So where one who suffered a recovery had power to do it, it will be presumed that it was done with all the legal requisites.^t So it is always inferred that the records of a court of justice have been correctly made,^u that judges and juries do nothing maliciously,^x and that the decisions of a court of competent jurisdiction are well founded.^y The court will not presume any fact to vitiate an order of removal.^z Upon the same principle, the courts, after verdict, will presume that facts, without proof of which the verdict could not have been found, were proved, although they were not alleged, provided upon reasonable intendment these facts can be considered as included in the general terms used;^a where an order of bastardy purports to have been made on the evidence of the *mother, [760 who is a married woman, and on *other* evidence, the court, in support of the order, will intend that the other evidence was legal evidence.^b So it will be presumed, till the contrary be shown, that a child born in wedlock is legitimate, for the maxim of law is, "*Pater est quem nuptiæ demonstrant*;"^c that the signatures in parish registers are those of the person whose duty it is to sign them;^d that a rate is equally made.^e So on a return to a mandamus, which on the face of it is certain, the court will not intend facts inconsistent with it, but will intend in favor of the return and not against it.^f So that an estate was sold in the manner directed by a statute.^g

But notwithstanding the general presumption, *omnia rite esse acta*, positive proof may still be necessary, if any counter presumption be raised by the circumstances. Thus where the inhabitants of Has-

^r *Bellamy's case*, 6 Co. 38.

^s *Ibid.*

^t 2 Saund. 42 a, (7).

^u *Read v. Jackson*, 1 East, 355; see *Lord Carnarvon v. Villebois*, 13 M. & W. 313.

^x *Per Eyre, B.*, 1 T. R. 503.

^y See tit. JUDGMENT. *Res judicata pro veritate accipitur*; L. 207, ff. de reg. jur.

^z *R. v. Stockton*, 5 B. & Ad. 546; E. C. L. R. 27.

^a *Spiers v. Parker*, 1 T. R. 141; *R. v. Twynning*, 2 B. & Ald. 386; *Tebbutt v. Selby*, 6 A. & E. 786; E. C. L. R. 33; see 1 Wms. Saund. 220.

^b *R. v. Bedell*, Andr. 8.

^c See tit. BASTARDY. But a child born during a divorce *a mensâ et thoro*, is presumed to be illegitimate; *St. George's v. St. Margaret's*, 1 Salk. 123.

^d *Taylor v. Cooke*, 8 Price, 653.

^e See tit. RATE.

^f *Per Buller*, Doug. 158.

^g *Doe v. Evans*, 1 Cr. & M. 450; *Doe v. Gore*, 2 M. & W. 320.

lingfield, in defence of an indictment against them for not repairing a highway, gave in evidence an award by commissioners under an Inclosure Act made sixteen or seventeen years ago, by which they awarded that the highway was not within the parish, but it appeared that the defendants had repaired it ever since, it was held, that the usage raised a presumption that proper notices had not been given according to the Act.^h

Some of the most important presumptions, founded on lapse of time and length of enjoyment, have already been alluded to.ⁱ Where the existence of a particular subject-matter or relation has once been proved, its *continuance* is presumed till proof be given to the contrary, or till a different presumption be afforded by the very nature of the subject-matter.^k Thus it is to be *presumed, *761] within certain limits, that a person once proved to have existed still exists.^l This presumption ceases at the expiration of seven years from the time when the person was last known to be living:^m but there is no legal presumption as to the particular time of death during that interval.ⁿ So where two or more have been proved to be partners, it is to be presumed that the partnership afterwards subsists, unless the contrary be shown.^o And the same presumption seems to exist, that an agent who has long been known to have acted for his principal continues to be authorized so to do.^p Upon an indictment for a libel against *Lord St. Vincent*, as first lord of the admiralty, after proof of his appointment by patent *previous* to the publishing of the libel,^q it was held to be evidence that he was so at the time of publication, and that proof of the determination of the appointment lay on the defendant.^a

^h *R. v. Halsingfield*, 2 M. & S. 558; *Middleton v. Barned*, 4 Ex. 241, *supra*, p. 755.

ⁱ *Supra*, p. 742; and see tit. PRESCRIPTION.

^k See Lord Ellenborough's observations in *Doe v. Palmer*, 16 East, 55, as that a pauper proved to have been settled in a parish continues settled there; *R. v. Tanner*, 1 Esp. 306.

^l *Throgmorton v. Walton*, 2 Roll. Rep. 461.

^m See tit. DEATH; and see the stat. 19 Car. II., c. 6, as to lessees for lives, and the stat. 6 Anne, c. 18. Marriage and the birth of a child cannot be presumed, although the alternative is to presume death without issue; *Doe d. Oldham v. Wolley*, 8 B. & C. 22; E. C. L. R. 15.

ⁿ *Doe dem. Knight v. Nepean*, 5 B. & Ad. 87; E. C. L. R. 27; 2 M. & W. 895; *S. C.* in *Cam. Scacc.*

^o See tit. PARTNERS.

^p *Trueman v. Loder*, 11 A. & E. 589; E. C. L. R. 39.

^q *R. v. Budd*, 5 Esp. C. 230.

Where a party holds over after the determination of a lease, an agreement is presumed, to hold on the same terms, so far as they are applicable,^r in the absence of evidence of any other agreement.^s

Most important presumptions are derivable from the *conduct of parties, as well in civil as criminal proceedings. If [*762 circumstances induce a strong suspicion of guilt, and where the accused might, if he were innocent, explain those circumstances consistently with his own innocence, and yet does not offer such explanation, a strong natural presumption arises that he is guilty. And in general, where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a forcible inference against him.

Presumptions from a man's conduct operate, as has been seen, in the nature of admissions; for, as against himself, it is to be presumed that a man's actions and representations correspond with the truth.^t These are in all cases evidence of the fact; and where the party has wilfully induced another to act on the faith of such representations, and where he cannot show the contrary, without being guilty of a breach of good faith and common honesty, such representations are usually not barely evidence of the fact, but are absolutely conclusive.^u

Numerous and most important presumptions are founded merely on the common and ordinary experience of mankind; as that a man will not pay a debt which is not due;^v or acknowledged the exist-

^r *Digby v. Atkinson*, 4 Camp. 275; *Roe v. Ward*, 1 H. B. 97; *Roberts v. Hayward*, 3 C. & P. 432; E. C. L. R. 14; *Doe v. Amey*, 12 Ad. & E. 476; E. C. L. R. 40; *Doe v. Dobell*, 12 Q. B. 806; E. C. L. R. 64. Even against the successor of a dean and chapter who granted the original lease; *Doe v. Tanriere*, 12 Q. B. 998; E. C. L. R. 64; and though the rent be altered; *Hutton v. Warren*, 1 M. & W. 475. As to whether this is a presumption of law or fact, see *Johnson v. Sl. Peter, Hereford*, 4 Ad. & E. 520; E. C. L. R. 31.

^s *Mayor of Thetford v. Tyler*, 8 Q. B. 95; E. C. L. R. 55.

^t See tit. ADMISSIONS.

^u *Pickard v. Sears*, 6 A. & E. 469; E. C. L. R. 33; *Freeman v. Cooke*, 2 Ex. 654. If A rent lands of B, the incumbent of a living, and pay him rent, he cannot show, in defence of an action for use and occupation, that the presentation was simoniacal; *Cooke v. Loxley*, 5 T. R. 4.

^v "Presumptionem pro eo esse qui accepit, nemo dubitat, qui enim solvit nunquam ita re supinus est, ut facile suas pecunias jactet et indebitas effundat;" L. 25, ff. de probat.

ence of a debt to which he is not liable. That every man contemplates and intends the natural consequence of his act.⁷

*763] *Many again are derived from the course and habit of dealing in a particular trade or business; as that the parties intended to contract according to the usual course of dealing.⁸ Other presumptions are made from the ordinary course of public departments,⁹ as that a letter properly directed and sent by the post,¹⁰ or given to the postman,¹¹ reached its destination.

It would, however, be a vain endeavour to attempt to specify the numerous presumptions with which the knowledge of a jury, conversant in the common affairs and course of dealing in society, necessarily supplies them; it is obvious that such presumptions are co-extensive with the common experience and observation of mankind.¹²

⁷ See tit. INTENTION—MALICE. In *R. v Sheppard*, R. & R. C. C. 169, the prisoner was employed by *Mordey* to buy stock for him, and he advanced him money so to do: the prisoner forged the stock receipt, and was convicted of so doing with intent to defraud *Mordey*, although the latter swore that he believed he had no such intention. So from the fact of killing another the law presumes malice; *Fost.* 256; as it also does from the fact of publishing a libel; *Haire v. Wilson*, 9 B. & C. 643; E. C. L. R. 17; from the absence of probable cause for a criminal prosecution; *Burley v. Bethune*, 5 Taunt. 583; E. C. L. R. 1; *Crozer v. Pilling*, 4 B. & C. 26; E. C. L. R. 10; and from knowingly making a false representation, whereby another is injured; *Tapp v. Lee*, 3 B. & P. 367; *Pontifex v. Bignold*, 3 M. & G. 63; E. C. L. R. 42; see *Fountain v. Boodle*, 3 Q. B. 5; E. C. L. R. 43.

⁸ *Supra*, p. 710; and see tit. CUSTOM.

⁹ See *Van Omeron v. Dowick*, *supra*, p. 757.

¹⁰ *Walter v. Haynes*, R. & M. 649; E. C. L. R. 21, p. 721.

¹¹ *Skilbeck v. Garbett*, 7 Q. B. 846; E. C. L. R. 53.

¹² For other observations connected with the subject, see Ind. tit. PRESUMPTION. Although the owner is liable to the master for money actually laid out for the benefit of the ship, yet he is not liable to a stranger for money advanced, unless it be expressly advanced for that purpose; *Thacker v. Moates*, 1 M. & Rob. 79. The declarations of a shopman are not evidence against his employer, unless made in the course of his employer's business; *Garth v. Howard*, 8 Bing. 451; E. C. L. R. 21. But in an action for freight by the master, the declarations of the owner were admitted as evidence for the defendant; *Smith v. Lyon*, 3 Campb. 465; *Ellenborough, C. J.*, 1813.

*CHAPTER II.

[*764]

DUTY OF THE COURT.

It is the undoubted province of the court, not only to expound the law as applicable to the facts,^a but also to decide upon all interlocutory matters which arise collaterally in the course of the trial.^b Previous to a few remarks upon the distinction between law and fact, it will be convenient to consider more particularly the process by which the law is applied to facts.

So infinitely varied and complicated are human affairs that no code of law can provide *à priori* for all possible predicaments which may happen; all that can be done is to annex consequences and incidents to certain defined combinations of circumstances described in general terms, capable of being applied to such particular modes or predicaments as may occur in practice. In order, then, to establish a claim or charge, circumstances must be alleged which show that the claim or charge is warranted in point of law, supposing those allegations to be true. In other words, the allegations upon the record are nothing more than a specification of facts and circumstances, which in point of law are essential to support the charge or claim. Thus, on a charge of larceny, the indictment alleges all the particulars essential to the offence, a caption, and an asportation of *specific property belonging to a particular owner with a felonious intention. Now, with [*765 respect to every essential allegation, although the jury must find the facts, it is always for the court to decide whether those facts, when proved, support the allegations in points of law. Thus, in the case of larceny, the jury must decide upon the evidence whether the prisoner removed at all the goods alleged to be stolen, and how far, and under what circumstances, he removed them; but whether such a removal be an asportation, sufficient to con-

^a After the jury are charged, they can only state a question and receive the law from the Court; the Court therefore refused to permit them to have a law treatise on the subject, which had been cited; *Burrows v. Unwin*, 3 C. & P. 310; E. C. L. R. 14.

^b See Hale's P. C. 306; Sid. 235; *Goodman v. Cotherington*, Sty. 233; *Bennett v. Hundred of Hertford*, Tri. per Pais, 209; *Anon.*, Salk. 405; B. N. P. 308; *Kitchen v. Mainwaring*, cited Andr. 321.

stitute felony, is pure matter of law. Hence, in order to substantiate every charge or claim as alleged on the record, it is essential that the jury should find some predicament or state of facts falling within the description contained in each essential allegation, and that the court should adjudge such special modes or facts to be sufficient in law to sustain those allegations. This must be done in one or other of two ways; either the court must inform the jury hypothetically, that the facts which the evidence tends to prove will, if proved, satisfy the allegations, being but particular modes which fall within the essentials enumerated in the general definition, or the jury must find those predicaments or modes specially, and then the court can afterwards apply the law, and pronounce whether the facts proved be, or be not such as satisfy the general and defined essentials to the charge or claim.

It is obvious, that in order to enable the court afterwards to apply the law to the facts, the jury must find, not merely evidence or circumstances which *tend* to prove or disprove facts falling within the particulars which are essential to support the charge or claim, but must either find particular modes included within the description, or such facts as negative one or more of the circumstances essential to the charge or claim. Thus, if in the case of larceny, the jury were to find specially, that the prisoner *took* the goods described in the house of *A. B.* with the intention of stealing them, *removed* them for the space of one hundred yards; *766] and that *A. B.*, the alleged owner, had *a special property in them as a bailee; then, as the finding would embrace facts which were special modes falling within each of the descriptive allegations essential to the offence, the court would be enabled afterwards to apply the law by pronouncing the prisoner to be guilty. So if, on the other hand, the jury were in such case to find, *inter alia*, that a bale of goods was taken by the prisoner and removed, but that it still remained connected with the shop from which it was taken by a rope or chain, such a finding would negative every mode or species of asportation, and the court would pronounce accordingly.^o But again, if the jury were in such case to find *mere evidence*,^a however cogent, of any of the essential facts,

^o See *R. v. Phillips*, East, P. C. 662.

^a In a special verdict, all the facts must be found on which the judgment is founded, and not mere evidence of facts; *Hubbard v. Johnstone*, 3 Taunt. 209. But where a special case is reserved, if the circumstances be such as to enable the Court to say, without difficulty, what ought to be the verdict of the jury upon them,

the court could not draw the conclusion. Thus, if they were to find, that immediately after the goods were missed the prisoner was seized with the goods in his possession, and that he confessed that he was guilty, this might be abundant evidence to prove his guilt, but would be *mere* evidence,* and the court could pronounce no judgment.¹

the Court is at liberty to decide the question; *Thompson v. Giles*, 2 B. & C. 422; E. C. L. R. 9. And in general it is agreed, on a special case, that the Court shall be at liberty to draw the same inferences from the facts as a jury. Great objection has been raised, under such circumstances, to the case being afterwards turned into a special verdict; *Engstrom v. Brightman*, 5 C. B. 419; E. C. L. R. 57.

* So, where in trover the jury merely find a demand and refusal without expressly finding a conversion, or any fact which in point of law amounts to an actual conversion, the Court can give no judgment; *Mires v. Solebay*, 5 Mod. 244. In *Harwood v. Goodright*, Cowp. 87, the jury found, that after the will had been executed by a testator, in favour of Harwood, he executed another will, the contents of which were unknown; and it was contended by the heir at law that this amounted

¹ It is a well-settled doctrine of the courts both in England and this country that a special verdict must find facts—not merely state the evidence from which facts may be inferred. It will not be helped by intendment. Every fact not ascertained by it, is supposed not to exist; *Brown v. Ralston*, 4 Rand. 504; *Lee v. Campbell*, 4 Post, 198; *Seaward v. Jackson*, 8 Cowen, 406; *Thompson v. Farr*, 1 Speers, 93; *Sewall v. Glidden*, 1 Ala. 52; *Hill v. Covell*, 1 Comst. 522; *Sisson v. Barrett*, 2 Comst. 406; *Langley v. Warner*, 3 Ibid. 327; *The State v. Watts*, 10 Iredell, 369; *Blake v. Davis*, 20 Ohio, 321.

A special verdict however which finds what the law has made conclusive evidence of a fact is sufficient; *John v. Bates*, Litt. Sel. Cases, 106.

A special verdict, presenting no other question than the relevancy of testimony offered on the trial is bad; *Welland Canal Co. v. Hathaway*, 8 Wend. 480.

So where it does not find in the alternative according as the opinion of the court upon the facts may be; *The State v. Wallace*, 3 Iredell, 195.

If the jury in a special verdict find facts only, the court must draw the legal conclusion from them; and if they draw conclusions against the law upon the face of them, the court will reject the conclusion and judge upon the facts. Where the jury find only such facts as leave the question of law equivocal, and then draw a conclusion which the facts not found might have warranted, the court will say that their conclusion is against law; *Butler v. Hopper*, 1 Wash. C. C. 499; *Peterson v. United States*, 2 Ibid. 36.

Where a verdict is for any reason bad, the court will award a *venire de novo*; *Bellows v. Hallowell*, 2 Mason, 31; *Stodder v. Powell*, 1 Stewart, 287; *Sewall v. Glidden*, 1 Ala. 52.

An agreed case, in the nature of a special verdict is to be considered as a special verdict found by a jury, and if it be defective in substance, the judgment rendered upon it will be reversed, and a *venire de novo* awarded; *Whitesides v. Russell*, 8 Watts & Serg. 44.

*Where a *general* verdict is given, the same process occurs
 *767] at the trial; the jury decide what facts are proved, and receiving and applying the law expounded by the court, as the court would have applied it had the jury found the facts simply, pronounce a general verdict involving both law and fact.

It has been frequently doubted, whether a particular question be one of *law* or of *fact*. Thus far is clear, that whenever upon particular facts found, the court, by the application of any rules of law can pronounce on their legal effect, with reference to the allegations on the record, such inference is matter of law. It is also clear, that whenever the court cannot pronounce on the legal effect of particular facts, and where it is requisite, to enable them to do so, that the jury should find some other inference or conclusion, such further inference or conclusion is a question of fact. It is most emphatically true, that a jury can decide matters of fact only;† they may indeed apply the law as delivered by the court, but in this respect they act merely ministerially, under the direction of the court.

Every general verdict, and indeed every allegation on the record found by a jury to be true, involves matter of law as well as matter of fact; for it is always a question of law, whether the particular facts proved satisfy the allegations upon the record. Every legal
 768] definition and allegation, and every general verdict, involves both law and fact. Thus, in the simplest case, if the issue be whether *A.* assaulted *B.*, it involves a question of law as well as of fact: what *A.* did is a question of fact; whether what he so did amounted in law to an assault, is a question of law. Still the question for the jury is one of mere-fact, for upon the advice of the court they find a general verdict, applying the law to the

to a revocation. Lord Mansfield, in giving judgment, said, "In considering this special verdict, the duty of the Court is to draw a conclusion of law from the facts found by the jury, for the Court cannot presume any fact from the evidence stated. Presumption, indeed, is one ground of evidence; but the Court cannot presume any fact. In case the defendant had been proved to have destroyed this last will, it would have been a good ground for the jury to find that this was a revocation: but the jury, on the presumption, must have found the fact. So with regard to all other circumstances, as that the will was in the hands of the heir at law, and that there were three attesting witnesses to the will, these would have been proper for the jury to have considered, but we are confined by the facts found by them."

† *Bishop of Meath v. Marquis of Winchester*, 4 Cl. & F. 445; 3 Bing. N. C. 183; E. C. L. R. 32.

facts proved; or they find the facts, and the court afterwards applies the law.⁵

Hence, it follows, that a question or inference of fact, is one which the jury can find upon the evidence by virtue of their own knowledge and experience, without any legal aid derived from the court; and that an inference or conclusion of law, is one which the court can draw from the mere circumstances of the case as ascertained by a jury, independently of any general inference or conclusion drawn by the jury.

In ordinary cases this distinction is perfectly clear; but it is now necessary to advert to a class of cases in which doubt has arisen, whether particular questions and inferences belong more properly to the court or to the jury.

This occasionally happens where some general inference or conclusion is to be drawn from a number of particular facts and circumstances appertaining to the individual case; as in the instances of reasonable time, probable cause, due diligence, and others of a similar nature.

It will be proper to consider the origin and nature of these questions a little more particularly. Every law, it has been observed, consists in the annexation of certain legal incidents to particular combinations of facts. Such definitions of necessity must be of a general and abstract nature. No human sagacity can, in framing laws, provide specifically for the almost infinite variety of cases which occur in practice; and therefore all that can be done in *many instances is to define, not by an enumeration of facts, which, in cases depending on a great variety of minute and varying circumstances would be impracticable, but by means of some general result or inference from them, as in the instances above alluded to, of reasonable time, due diligence, &c. [769

For instance, the law cannot prescribe in general what shall be a *reasonable time*, by any defined combinations of facts. So much does the question depend upon the situation of the parties, and the minute and peculiar circumstances incident to each case. If a man has a right, by contract or otherwise, to cut and take crops from the land of another, the law, it is obvious, can lay down no rule as to the precise time when they shall be cut and removed; all that can be done is to direct or to imply that this shall be done in a reasonable and convenient time; and this must obviously depend on the state

⁵ An allegation of duty is an allegation of matter of law; *R. v. Everett*, 8 B. & C. 114; *E. C. L. R.* 15.

of the weather and other circumstances which cannot from their nature form the basis of any legal rule or definition.^h

*General terms then, such as reasonable time,ⁱ and
*770 *771] others of a similar nature, being technical and legal *ex-

^h *Eaton v. Southby*, Willes, 131; where the plaintiff in replevin pleaded to an avowry, justifying the taking goods as a distress for rent in arrear, that he took the growing crops under an execution, and afterwards cut the wheat, and let the same lie on the premises until the same in a course of husbandry was fit to be carried away; and that the defendant distrained the same before it was fit to be carried away; it was objected by the defendant, on demurrer to this plea, that the plaintiff ought to have set forth how long the corn lay on the land after it was cut, that the court might see whether it were a reasonable time or not. But the court decided that the objection was untenable; for though in Co. Litt. 56, b., it is said that in some cases the court must judge whether a thing be reasonable or not, as in the case of a reasonable fine, a reasonable notice, or the like, it would be absurd to say, that in a case like the present the court must judge of the reasonableness; for if so, it ought to have been set forth in the plea, not only how long the corn lay on the ground, but what weather it was during that time, and many other incidents which would be ridiculous to be inserted in a plea. And the court were of opinion that the matter was sufficiently averred; and that the defendant might have traversed it if he had pleased, and then it would have come before a jury, who, upon hearing the evidence, would have been the proper judges of it.

So in the case of *Bell v. Wardell*, Willes, 202, where the defendant in trespass justified under an alleged custom, for the inhabitants of a town to walk and ride over a close of arable land, at all *seasonable times*, it was held, that *seasonable times* was partly a question of fact, and partly a question of law; and on demurrer to the replication of *de injuriâ*, the court said, as the custom is laid here, if it were not a seasonable time, the justification is not within the custom; and though the court may be the proper judges of this, yet in many cases it may be proper to join issue upon it, that is, in such cases where it does not sufficiently appear on the pleadings whether it were a seasonable time or not. Accordingly, it is said, in the case of *Hobart v. Hammond*, 4 Rep. 27, that the reasonableness of fines must be determined by the Judges, either on demurrer or on evidence laid before a jury. For issues may be joined on things which are partly matters of fact, and partly matters of law; and then when the evidence is given at the trial, the Judge must direct the jury how the law is; and if they find contrary to such direction, it is a ground for a new trial. This is the proper course in actions for malicious prosecution, with respect to the question of reasonable and probable cause, (*Panton v. Williams*, 2 Q. B. 169; E. C. L. R. 42,) which is discussed separately, *infra*, pp. 781, 782.

ⁱ Although time be a necessary ingredient in almost every contract and legal obligation, yet inasmuch as the time for performing an act must depend upon a great number of varying circumstances, the law cannot lay down precise rules applicable to all cases, or do more than prescribe generally a reasonable time.

And in general, questions of reasonable time, reasonable care, due diligence, (*per Tindal, C. J., Mellish v. Rawdon*, 9 Bing. 423; E. C. L. R. 23; *Shute v.*

pressions, it is clear, in the first place, that in the abstract they involve matter of law as well as matter of fact; for in the application of all legal expressions, it is a question of legal judgment and discretion to pronounce whether the facts as found by a jury do or not satisfy that legal expression or allegation.^k It is therefore

Robins, M. & M. 133; *E. C. L. R.* 22; and such like, depend so much on their own peculiar circumstances as not to admit conveniently of any general rules; and it is of greater convenience to depend on the judgment and discretion of a jury, deciding on a comparison of the circumstances with the ordinary course of practice, or with reference to the ordinary principles of fair and honest dealing, than to introduce such a multiplicity of legal rules and definitions as would be necessary for the due decision of cases subject to such infinite variety of circumstances. It is in truth a matter of important and obvious policy, rather to refer questions of this nature as matters of fact to a jury, than to frame legal rules applicable to particulars. The difficulty of framing precise rules must, in such instances, be very great, by the reasons adverted to, unless they be founded on some prominent and decisive incidents; whenever the court decided upon circumstances, the decision would become a precedent and rule of law; and as each decision would afford room for comparison for a great number of distinctions, the obvious effect would be to multiply such decisions and distinctions to a very inconvenient and burdensome extent. On the other hand, by abstaining from legal decision, except in cases where some decisive rule or principle of law is clearly applicable, and by adopting in others the inference of the jury, in point of fact, substantial justice is administered in simplicity, and free from the perplexity occasioned by nice and subtle distinctions and conflicting decisions. And this is an advantage, and by no means an unimportant one, incident to the system of trial by jury; the law can thus deal in general definitions, and leave the rest as facts to the jury, without multiplying decisions and precedents; but if the Judges and not the jury were to decide, every decision would become a precedent, and legal distinctions would be multiplied to an excessive extent.

^k The question, whether the facts of a particular case fall within the general terms of a statute, is (at least usually) a question of law, whether the statute define the meaning of its own terms, or use them without definition, according to their ordinary acceptation and meaning. If a special verdict involve the question whether a party be a bankrupt, it is not essential that the jury should draw the conclusion; the courts may do it from the facts found; *Dodsworth v. Anderson*, *Jon.* 142. So if the question be whether the party be a chapman within the stat. 5 Ann. c. 14; *Kearle q. t. Boulter*, *Say.* 191; *Bac. Ab.* tit. stat. H.

The rule applies to all statutory expressions, and to all allegations in issue, however common and popular their sense and meaning may be. Thus, where the issue was, whether *C. D.* was an inferior tradesman (under the stat. 4 & 5 Will. III. c. 23, s. 10; now repealed,) although it was for the jury to find whether *C. D.* was a tradesman, and to ascertain the nature and kind of trade, it was for the court to decide whether he came within the description in the statute; *Buxton v. Mingay*, 2 Wills. 70; see tit. TRESPASS.

Executors shall have reasonable time to take the goods of their testator from his mansion; *Litt. s.* 69. This reasonable time shall be adjudged by discretion of

*772] *in all cases for the court to pronounce whether the facts show that the time was reasonable; just as it is for the court to decide whether the facts found show an alleged asportation or conversion, or bankruptcy, in point of law.¹

But in particular cases the inference in law follows the inference in fact: where the court cannot draw the inference that the time was reasonable, the jury must draw the conclusion in fact; and then the time will be reasonable in point of law, according as it is reasonable in point of fact.

*773] Hence it follows that the test for deciding whether *such a general inference as to reasonable time, &c., be one of law or of fact, is this: if the court, in the particular case, can draw the conclusion by the application of any legal rules or principles, the conclusion is a legal one;^m for the rules and principles of law must

the justices before whom the cause dependeth. And so it is of reasonable fines, customs and services, upon the true state of the case depending before them; for reasonableness in this case belongeth to the wisdom of the law, and therefore to be decided by the justices. *Quam longum esse debet non definitur in jure, sed pendet ex discretione judiciariorum.* And this being said of time, the like may be said of things uncertain, which ought to be reasonable, for nothing that is contrary to reason is consonant to law; Co. Litt. 56. b. Six days were held by the court to be a reasonable time for removing the goods of a lessee for life by his executors after his death; *Stodden v. Harvey*, Cro. J. 204. Power is given to the lessor's son to take the house to himself on coming of age; he must make his election within a reasonable time; a week or fortnight is reasonable; a year is reasonable; *Doe v. Smith*, 2 T. R. 436. A reasonable time for countermanding a trust was held to be a question of law; *Scheibel v. Fairbairn*, 1 B. & P. 388. In *Hurst v. Royal Exchange Assurance Co.*, 5 M. & C. 47, laches of five days after intelligence of the loss, and before notice of abandonment was given, was held by the court to be too long. What is a convenient time for the taking of a prisoner, by the sheriff, to prison, is a question for the Judge; tit. SHERIFF. The question, whether a market is held so near to another as to constitute a nuisance, is sometimes a question of law; tit. NUISANCE. And see further, as to reasonable time, the observations of Abbott, C. J., in *Smith v. Doe dem Lord Jersey*, 2 B. & B. 592. *infra*, note (o); E. C. L. R. 6.

¹ The construction the law putteth on facts found by a jury, is in all cases undoubtedly the proper province of the court; Post. 256.

^m This happens very generally upon the question of reasonable fines, customs, and services; Co. Litt. 56, b. 59, b.; *Hobart v. Hammond*, 4 Co. 27, b.; *Stodden v. Harvey*, Cro. J. 204. So in the case of *Bell v. Wardell*, Willes, 202, *supra*, p. 770, where the plaintiff in trespass justified under an alleged custom for the inhabitants of a town to walk and ride over a close of arable land at all seasonable times, but it appeared by the plea that the trespass was committed whilst the corn was standing; the court, upon demurrer, decided that the time was not seasonable. In *Wright v. Court*, 4 B. & C. 596; E. C. L. R. 10; the court held, on

prevail against the opinion of a jury.ⁿ But if, on the other hand, the circumstances do not bring the case within any general principle, or definite rule of law, the further inference is necessarily one of mere fact, to be made by the jury. In other words, the rules of ordinary practice and convenience become the legal measure and standard of right.

Thus in the case of a bill of exchange, where the law requires notice of dishonor to be given within a reasonable time; if it appear on the facts proved in evidence, that the case is one falling within a rule by which the law itself prescribes and defines what shall be considered to be reasonable time, the question is a mere question of law, for the *law itself, from the mere *res gestæ*, [*774 makes the inference that the time was reasonable time.^o The duty of the jury in such a case is obviously confined to the finding and ascertaining of the simple facts and *res gestæ*; any inference of theirs upon the subject, that the time was or was not reasonable, would be either simply nugatory, or both nugatory and illegal.

Where, on the other hand, the law is silent, and does not by the operation of any principle or established rule decide upon the legal

demurrer to a plea justifying an imprisonment on a suspicion of felony, that the detention of the plaintiff for three days, to give the prosecutor an opportunity for collecting witnesses, was an unreasonable time. What is necessary for an infant was formerly (*Makarell v. Bachelor*, Cro. Eliz. 583.) erroneously thought to be a question of law; *Peters v. Fleming*, 6 M. & W. 42; *Wharton v. Mackenzie*, 5 Q. B. 606; E. C. L. R. 48.

ⁿ We call those questions of fact where the business is to know the truth of facts; and we call those questions of law where the matter is about reasoning on facts that are agreed on, in order to draw from them the consequences which may seem to establish the rights of the parties; Domat's Pub. L., B. 4, tit. 1, p. 658.

^o *Williams v. Smith*, 2 B. & Ald. 496; *Wright v. Shawcross*, *ibid.* 501; *Tindall v. Brown*, 1 T. R. 167. In *Smith v. Doe dem. Lord Jersey*, 2 B. & B. 592; E. C. L. R. 6; Abbott, C. J., said, "I conceive that in this, as well as in all other cases, courts of law can find out what is reasonable; and that in some cases they are absolutely required to do so. In many cases of a general nature, or prevailing usage, the Judges may be able to decide the point themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite." And see *Startup v. Macdonald*, in error, 6 M. & G. 593; E. C. L. R. 46; in which case the court considered, that when bulky goods were by contract to be delivered within a certain time, the party had until twelve at night on the last day to deliver them; and upon an issue whether they were delivered at an unreasonable and improper time, the question was for the jury; and if they thought that at the time when they were tendered there was not a sufficient interval before twelve o'clock for completing the delivery, they ought to have found the time was unreasonable.

quality of the simple facts, or *res gestæ*, it is for the jury to draw the general inference of reasonable or unreasonable, in point of fact.^p In such cases the legal conclusion follows the inference in fact; in other words, the question as to reasonable time &c., is one of fact, *775] and the time is reasonable or unreasonable, *in point of law, according to the finding of the jury in point of fact.

If the question be, whether reasonable notice has been given by the holder, of the dishonour of a bill of exchange; and the evidence be, that the holder gave notice by the next day's post, to an indorser, living at a distance; the question would be one of mere law, for it would fall within an express rule of law which determines such notice to be reasonable.^q But where no acknowledged rule or principle of law defines the limits between reasonable and unreasonable, the question seems to be one for the jury under all the circumstances of the case.^r

It is next to be observed, that these terms, in the absence of any precise rule of law, always import a comparison with some usual course and order of dealing, or have reference to general convenience, utility, and the plain principles of natural justice. Where the law is silent, the jury must draw the inference, not as their own casual fancies or arbitrary opinions may dictate, but according to their judgment and discretion, upon comparison of the facts with the general and understood course of dealing, if any such exist, in reference to the matter litigated; and in the absence of any such guide, with reference to mutual convenience and utility, or the ordinary rules of fair and honest dealing; for these, in the absence

^p As upon the question whether a party has been guilty of laches in not presenting a bill payable at sight, or a certain time after, where no established rule of law prevails; *Fry v. Hill*, 7 Taunt. 397; E. C. L. R. 2; see tit. BILL OF EXCHANGE. Whether a particular covenant is an usual covenant in a lease; *Doe v. Sandham*, 1 T. R. 705. What is a reasonable time for carrying away tithes; *Facey v. Hurdum*, 3 B. & C. 213; E. C. L. R. 10. For removing a distress; *Pitt v. Shew*, 4 B. & Ald. 208; E. C. L. R. 6; and see other instances detailed, *infra*, pp. 779, 780.

^q *Williams v. Smith*, 2 B. & Ald. 496, *supra*, n. (o); and see tit. BILL OF EXCHANGE.

^r *Per* Lord Kenyon, in *Hilton v. Shepherd*, 6 East, 14, n.; *Fry v. Hill*, 7 Taunt. 397; E. C. L. R. 2. If the rule in the particular case, that the act must be done within a reasonable time, and the courts be able to pronounce that the act was done in a reasonable time, the decision becomes a legal precedent. If the court cannot decide on the evidence that the fact was done in a reasonable time, then a further finding as a *fact* that the time was reasonable is essential.

of any express rule of law, are the proper, and indeed the only, standards of comparison of which the case admits.

It follows, that such general questions of reasonable time, due diligence, and the like, are never in the abstract *necessarily either mere questions of law or questions of fact.* [776] Whether in a particular instance the question be of the one class or the other, depends simply upon the existence and applicability of the rule of law to the special circumstances, or *res gestæ*: if any such rule be applicable, the question is a mere question of law; if no such rule apply, the inference is one of mere fact for the jury.^t It may even happen that the very same circumstances which at one time would have raised a question of fact, may at a subsequent period raise a mere question of law; a rule of law which governs the case having been established in the interval.ⁿ

*Cases of this kind, where the jury are to find the special facts, and where the court can decide upon the legal quality [777] of those facts by the aid of established rules of law, independently of any general inference or conclusion to be drawn by a jury, have

^s In the case of *Darbishire v. Parker*, 6 East, 10 Lawrence, J., expressed an opinion, that reasonable time was *in general*, a question of law, because in the case of *Tindall v. Brown*, 1 T. R. 167, the jury found merely the circumstances. But with great deference to the opinion of that very learned Judge, it seems to be going too far to infer that reasonable time must always be a conclusion of law, because it was so considered in the particular case. In that case, the bill being dishonored on the 5th, and notice not given till the 7th, although the parties lived within twenty minutes' walk of each other, the jury nevertheless found for the plaintiff; but the court held that there was a sufficient foundation for laying down a legal rule, then but imperfectly established, as to the time of notice. Lord Mansfield said, "What is a reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts, such as the distance at which parties live from each other, the course of post, &c., but, whenever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by every one, for the sake of certainty."

These observations remove all difficulty: he does not say, that reasonable time, must always be an inference of law upon the facts; but only, where the law can lay down a rule as to reasonableness, which can only be recognizing a practice already established, or by applying legal principles to some defined combination of circumstances. And in accordance with this is the decision in *Straker v. Graham*, 4 M. & W. 721; and see *per Vaughan, J.*, 4 Bing. N. C. 268; E. C. L. R. 33.

^t Intention is a mere matter of fact, where the law does not infer the intention from the fact itself; *per Lord Mansfield, R. v. Woodfall*, 5 Burr. 2661; see *tit. INTENTION, and MALICE*.

ⁿ The rule as to notice to a tenant to quit, formerly was that reasonable notice should be given; but in the reign of Henry VIII. it was decided that six months' notice was necessary; See *Doe v. Spence*, 6 East, 123.

been sometimes termed *mixed questions of law and fact*. Thus it was said,* that the question of reasonable notice of the dishonour of a bill of exchange was a mixed question. That the situation and place of parties, the post-hours, and other matters of that sort, are facts to be ascertained by the jury; but whether under the circumstances notice was given in reasonable time, is a question of law, upon which they ought to receive the direction of the judge. Now, it seems to be clear, that whenever any rule or principle of law applies to the special facts proved in evidence, and determines their legal quality, its application is matter of law; and on the other hand, that whenever the special facts and circumstances are such that the court cannot by the aid of any legal rule or principle decide upon the legal quality of the facts, it is necessary that the jury should draw the inference *in fact as a mere question

*778] in fact, with reference to the ordinary course and practice of dealing, and the general principles of morality and utility. It may therefore be doubted whether the expression "mixed question of law and fact," be in strict propriety applicable to the former class of cases. For wherever the law uses a general technical and abridged form of expression, the question arising upon it is partly a question of law, partly a question of fact; the jury must in all instances find the facts which form the basis of the legal judgment, unless they be admitted by the parties; and it is for the court, in all cases, to decide upon the legal quality of those facts. So universal is this rule, that it applies even in those instances where, in the absence of any rule or principle of law which enables the court to draw the conclusion directly and immediately from the special facts, it is essential that the jury should draw the inference

* See *Darbishire v. Parker*, 6 East, 3; and the observations of Grose, J., *ibid.* The observations of Lord Mansfield, *supra*, note(s), and Buller, J., in *Tindall v. Brown*, 1 T. R. 167. The terming of any question a mixed question of law and fact, is chargeable with some degree of indistinctness. Questions of fact and law are not in strictness ever mixed; it is always for the jury to decide the one and court the other, however complicated the case may be. In some cases the main difficulty may consist in ascertaining the facts, where the application of the law to the ascertained facts admits of no doubt; in another the facts may be clear and simple, and their legal effect doubtful: but still in each case the provinces of the court and jury are perfectly plain and distinct. It is true, that in some instances the court could not, without the aid of a conclusion of facts drawn by a jury, apply the law: but this consideration does not properly occasion any intermixture of or confusion of the respective functions of the court and jury; for the latter, in drawing their conclusion, still confine themselves to mere matter of fact.

of reasonable time as a matter of mere fact; for even here the adjudication by the court, that the time is reasonable, involves matter of law as well as matter of fact, although the question whether the time be reasonable, in point of law, be dependent on the question whether it be reasonable in point of fact. If the jury were by their verdict to find all the special facts, and were also to find that the time was reasonable in point of fact, the judgment of the court upon this finding would still in all cases be matter of law. If in such a case the mere facts fell within any established rule or principle, the special inference made by the jury would be entirely nugatory, and the court would apply the rule of law to the special facts, even although the legal inference should be contrary to the inference in fact.⁷ In the absence of any such rule, the judgment of the court, that the time was reasonable, would follow the conclusion in fact; but it would involve that which is mere matter of legal consideration and judgment, that is, *the adjudication [779 that no legal rule applied to the facts, and that the question of law was consequently dependent on the question in fact. In strictness, therefore, as the legal application of every technical expression recognized by the law is partly a matter of fact and partly a matter of law, it may be doubted whether the terms "mixed question of law and fact" serve accurately to distinguish any particular class of cases. All technical expressions whatsoever, such as asportation,² conversion,³ acceptance,^b and the like, are in their application partly matters of law, partly matters of fact.

These observations may not, perhaps, be deemed to be altogether unimportant, when it is considered how essential it is to preserve the distinction between law and fact, and to prevent any misconception as to the relative functions of courts and juries.^c

Some of the cases to which these principles apply will next be adverted to. Reasonable time, &c., is always a question of fact in the absence of any rule or principle of law applicable to the cir-

⁷ For it would be a wrong conclusion in point of law; see *R. v. Whittlebury*, 6 T. R. 466.

² See tit. LARCENY.

³ See tit. TROVER.

^b See tit. FRAUDS, STATUTE OF.

^c It is of the greatest consequence to the law of England, and to the subject, that the powers of the Judge and jury be kept distinct; that the Judge determine the law, and the jury the fact; and, if ever they come to be confounded, it will prove the confusion and the destruction of the law of England; *per* Hardwicke, C. J., *R. v. Poole*, Cases tempt. Hard. 28.

cumstances. Thus, in an action for not removing goods distrained for rent, after the expiration of five days, it is a question for the jury, whether they were removed within a reasonable time afterwards.^d So whether the sheriff or his agents have used due diligence in attempting to discover and arrest a defendant under civil process.^e Even the question, whether an attorney has been guilty *780] of negligence, in not complying* with the practice of the court, is a question for a jury.^f

In the case of *Noble v. Kennaway*,^g where the defence to an action on a policy of insurance was, that there had been unnecessary delay in unloading the cargoes, it was held, that this was a question to be decided by a jury, who could not decide without being informed as to the usual practice of the particular trade. Where the defence to an action for the price of goods sold and delivered was, that they did not correspond with the sample, it was left to the jury to say whether, under the circumstances, the defendant had rejected the goods within a reasonable time.^h So, in a seeking voyage, a reasonable time for the seeing the adventure must be allowed; and in an action on a policy on such a ship, the question whether the time be reasonable must be determined by the state of things at the port where the ship happens to be.ⁱ And where overseers referred certain matters in dispute to arbitration, and provided that certain costs of the other party should be taxed and paid by the overseers, it was held, that they were to be paid in a reasonable time, and that what was a reasonable time was a question for the jury.^k

In the cases of *Tindal v. Brown*,^l and *Darbishire v. Parker*, it was said,^m that what is reasonable notice of the dishonour of a bill of

^d *Pitt v. Shew*, 4 B. & Ald. 208; E. C. L. R. 6; and see tit. DISTRESS.

^e *Hooper v. Lane*, 10 Q. B. 546; E. C. L. R. 59; and see tit. SHERIFF— NEGLIGENCE.

^f *Hunter v. Caldwell*, 10 Q. B. 69; E. C. L. R. 59.

^g Doug. 510.

^h *Parker v. Palmer*, 4 B. & Ald. 387; E. C. L. R. 6; *Coleman v. Gibson*, 1 M. & Rob. 168. What is a reasonable time for the delivery of bulky goods seems to be a question of fact for the jury; *Startup v. Macdonald*, 2 M. & G. 395; E. C. L. R. 40. Although the judgment in this case was reversed in 1 *Cam. Scacc.*, 6 M. & G. 593, *supra*, p. 774, note (o), E. C. L. R. 46; the grounds on which it was overruled seem to leave the proposition above quoted untouched.

ⁱ *Phillips v. Irving*, 7 M. & G. 325; E. C. L. R. 49.

^k *Burton v. Griffiths*, 11 M. & W. 817. ^l 1 T. R. 167.

^m 6 East, 10. But see *supra*, pp. 776, 777, and *Straker v. Graham* 4 M. & W. 721.

exchange is a question of law arising *upon the facts; and that a jury in such cases ought to receive the directions of the judge; a position incontrovertibly true wherever the law affords a rule which governs the case, for then the finding of the jury, that the time is reasonable or unreasonable in point of fact, cannot be placed in competition with the settled rules and principles of law, and can never prevail but where the law is silent, and where the general rules of law, founded upon a knowledge and experience of their general utility, are from the peculiar nature of the case supposed to be inapplicable. Thus, also, what is a reasonable time for which a suspected party may be committed for re-examination, is a question for the court to determine, the jury ascertaining the facts upon which the court is to found its determination.^a [*781]

The existence of probable cause was formerly treated as a question or inference of law.^o In an action for a malicious prosecution, the facts constituting the grounds of suspicion were set forth by the defendant in his plea, and the plaintiff demurred, if they did not amount to reasonable and probable cause.^p In later times, it was not unfrequently treated as a question of fact for the jury.^q The probable cause of prosecution must necessarily consist in the circumstances of the case within the defendant's knowledge, which tended to throw suspicion on the plaintiff. The existence of such circumstances, and their force and tendency, were thought to be questions rather of fact than of law; for the effect was to be measured by sound sense and discretion rather than by any rule of law, which could not measure mere probability. If such circumstances did exist, it was *and still is presumed that the defendant acted upon them; but this is not conclusively pre- [*782]sumed, for it is clear, that if, notwithstanding the existence of unfavorable circumstances, the defendant knew that the plaintiff was innocent, he would be liable in damages; for as to him, who was better informed, the circumstances could afford no probable

^a *Davis v. Capper*, 10 B. & C. 28; E. C. L. R. 21; 4 C. & P. 134; E. C. L. R. 19. *Cave v. Mountain*, 1 M. & G. 260; E. C. L. R. 39.

^o *Coxe v. Wirrall*, Cro. Jac. 193.

^p *Brooks v. Warwick*, 2 Stark, 389; E. C. L. R. 3; *Isaacs v. Brand*, *ibid.*, 167.

^q See *Candell v. London*, 1 T. R. 520, n.; *Johnstone v. Sutton*, 1 T. R. 544; *Reynolds v. Kennedy*, 1 Wils. 232; *Golding v. Crowle*, B. N. P. 14; *Beckwith v. Philby*, 6 B. & C. 637; E. C. L. R. 13; see tit. MALICIOUS PROSECUTION.

cause or ground of accusation.^r It is, however, now conclusively settled that the question of reasonable and probable cause is a question of law. "In the more simple cases," says Tindal, C. J., in delivering the judgment of the Court of Exchequer Chamber in *Panton v. Williams*,^s "where this question depends entirely on the *783] proof of the facts and circumstances which gave rise to and *attended the prosecution, no doubt has ever existed from the time of the earliest authorities, but that such question is purely a question of law to be decided by the judge." "There have been some cases in the later books which appear at first sight to have somewhat relaxed the application of that rule, by seeming to leave more than the mere question of the facts proved to the jury; but upon further examination it will be found, that although there has been an apparent, there has been no real departure from the rule. Thus, in some cases, the reasonableness and probability of the ground for prosecution has depended, not merely upon the proof of certain facts, but upon the question, whether other facts which furnished an answer to the prosecution was known to the defendant at the

^r *Sir Anthony Ashley's case*, 12 Co. *infra*, 92; notes (t), (u), (x); *Davis v. Russell*, 5 Bing. 354; E. C. L. R. 15; where the Judge, having directed the jury to consider whether the circumstances afforded the defendant reasonable ground for supposing that the plaintiff had committed a felony, and whether in his situation they would have acted as he had done, the court held that the direction was *substantially* correct. Best, C. J., in giving judgment, observed, it was for the jury to say whether they believed the facts; and, if they believed them, whether the defendant was acting honestly. In some cases it becomes a nice question, whether it is necessary to trace home to the defendant knowledge of the exact facts which show in truth there was not reasonable and probable cause, or whether it is not incumbent on the defendant to show his ignorance; see *Michell v. Williams*, 11 M. & W. 205. If A., having an opinion of counsel in his favor, arrests B., he is not liable to an action for a malicious arrest, if he acted honestly on that opinion; *secus*, if he believed he had no cause of action; *Ravenga v. Macintosh*, 2 B. & C. 693; E. C. L. R. 9; but this is with reference to the question of *malice*; and see *Mitchell v. Jenkins*, 5 B. & Ad. 588; E. C. L. R. 27; and tit. MALICIOUS ARREST.

^s 2 Q. B. 169; E. C. L. R. 42. In this case both the law and the fact were left entirely to the jury, and the Court of Error awarded a *venire de novo*; and see *Michell v. Williams*, 11 M. & W. 205; *Turner v. Ambler*, 10 Q. B. 252; E. C. L. R. 59; *West v. Baxendale*, 9 C. B. 141; E. C. L. R. 67. That reasonable degree of belief which is a criterion of *bona fides*, when the question is whether a party thought he was acting under a statute which entitled him, if so acting, to notice of action, is a question for the jury; *Cox v. Reid*, 13 Q. B. 558; E. C. L. R. 66.

time it was instituted :[†] again, in other cases, the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not :[‡] in other cases, the inquiry has been, whether from the conduct of the defendant himself the jury will infer that he was conscious that he had no reasonable or probable cause.^{*} But in these and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct of the defendant are really so many additional facts for the consideration of the jury ; so that in fact nothing is left to the jury but the truth of the facts proved, and the justice of the inferences to be drawn from such facts ; both which investigations fall within the legitimate province of the jury, whilst at the same time they have received the law from the judge, that according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution or the reverse. And such being *the rule of law where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are [784 more numerous and complicated."

The inference of fraud is also in some cases a mere question of law arising upon the facts ; in others it is a mere matter of fact.[‡] Where a trader alienates the whole of his effects for a past debt, he is guilty of fraud against his creditors, and commits an act of bankruptcy ; and the court will infer fraud from the facts, without the aid of a jury.[‡] If a creditor, knowing that his debtor was going to

[†] *James v. Phelps*, 11 A. & E. 483 ; E. C. L. R. 39.

[‡] *Haddrick v. Heslop*, 12 Q. B. 267 ; E. C. L. R. 64 ; accord ; *Turner v. Ambler*, 10 Q. B. 252 ; E. C. L. R. 59.

^{*} *Hinton v. Heather*, 14 M. & W. 131.

[‡] *Per* Lord Mansfield, in *Foxcroft v. Devonshire*, 2 Burr. 937. Fraud and covin is always a question or judgment of law on facts and intention ; *per* Lord Ellenborough, *Doe v. Manning*, 9 East, 59. But the *intention* is frequently a question of fact. Upon an issue taken generally on an allegation of fraud, it is a question of *fact*, and if there be no fraud in fact, there is none in law ; *per* Buller, J., *Pease v. Naylor*, 5 T. R. 80. The obtaining of a bill of exchange by fraud is a question of fact ; *Grew v. Bevan*, 3 Stark. C. 134 ; E. C. L. R. 3 ; and see tit. BILL OF EXCHANGE.

^{*} *Newton Chantler*, 7 East, 138 ; *Linton v. Bartlett*, 3 Wils. 47 ; *Wilson v. Day*, 2 Burr. 827 ; *Siebert v. Spooner*, 1 M. & W. 714 ; *Lenden v. Sharp*, 8 M. & G. 895 ; E. C. L. R. 46 ; *Estwick v. Caillaud*, 5 T. R. 420. But it is otherwise of a sale or transfer for full consideration then given ; *Baxter v. Pritchard*, 1 Ad. & E. 457 ; E. C. L. R. 28 ; *Rose v. Haycock*, *ibid.* 460 ; *Wainwright v. Clement*, 3 M. & W. 385 ; 6 Bing. N. C. 86 ; E. C. L. R. 37.

break, were, before any direct act of bankruptcy, to procure payment by *threats*, the law would pronounce that this was not fraudulent.^a

Or the question may be one of fact for the jury: as where it depends not on the mere act done, but upon the particular intention with which it was done:^b as where a trader conveys,^c or a debtor assigns his property, to defraud creditors.^d So it is a question of fact whether fraud has been practiced in procuring a blind man to execute a will.^e

*785] ^aThe inference as to *malice* and *intention*, also, may be one either of mere law, as in cases of homicide, where the law frequently infers a malicious intention from the facts, independently of any conclusion drawn by the jury.^f Or of mere fact, as in cases where some malicious intention in particular is essential to the charge;^g or where the nature of an act depends on the particular intention of the parties.^h

The question, whether a party had knowledge of a particular fact, is usually a question of fact to be left to the jury.ⁱ

The question whether a sheriff,^k an attorney,^l or agent has been

^a *Per* Lord Mansfield, 2 Burr. 938.

^b And see tit. INTENTION.

^c *Newton v. Chantler*, 7 East, 145; *Siebert v. Spooner*, 1 M. & W. 714; and see tit. BANKRUPT.

^d Notes to *Twyne's case*, 1 Smith, L. C. 9; and see tit. FRAUDULENT CONVEYANCE.

^e *Per* Heath, J., *Longchamp v. Fish*, 2 N. R. 419.

^f See tits. MURDER—LIBEL.

^g See tits. MALICIOUS PROSECUTION—MALICIOUS ARREST—INTENTION—MALICE—MALICIOUS INJURIES—LIBEL. On a prosecution for larceny, the *quo animo* is for the jury; *R. v. Phillips*, East, P. C. 662; see tit. LARCENY. So to what purpose trees cut down by a tenant were intended to be applied by him; *Doe v. Wilson*, 11 East, 56; see tit. COPYHOLD.

^h *Powis v. Smith*, 5 B. & Ald. 850; E. C. L. R. 7. So according to the civil law, "*Quicumque intentionem facto superstruit factum id tenetur probare, ut non neganti sed adfirmanti incumbat probatio.*" The intention of the parties in paying or receiving rent is for the jury; *per* Gould, J., 1 H. Bl. 312; *Goodright v. Corder*, 6 T. R. 319; see tit. PAYMENT.

ⁱ *Harratt v. Wise*, 9 B. & C. 712; E. C. L. R. 17; where it was held that knowledge on the part of the captain of a vessel, of the fact that a foreign port was in a state of blockade, was not to be presumed on the ground that notice to a State was notice to all the subjects of that State, but was to be proved as matter of fact. It is a question of fact for the jury to whom credit was given by the vendor of goods; *Leggat v. Reed*, 1 C. & P. 16, and note; E. C. L. R. 12; *Bentley v. Griffin*, 5 Taunt. 356; E. C. L. R. 1.

^k *Hooper v. Lane*, 10 Q. B. 546; E. C. L. R. 59.

^l *Hunter v. Caldwell*, 10 Q. B. 69; E. C. L. R. 59.

guilty of negligence, is one of fact for the decision of the jury, even where it consisted in not complying with the practice of the court.^m

What shall be said to be the next sessions, that is, the next practicable sessions, for an appeal against a removal order, is a question of fact, inasmuch as it frequently *depends on the particular situation of the parties, and the circumstances of the case." [*786

Reputed ownership, it seems, is a question of fact rather than of law.^o

An allegation that a person is employed in the service of the customs is an allegation of fact: the allegation that it was his duty as *such* to seize goods which on importation are forfeited, is matter of law.^p

The construction of all written documents is matter of pure law, as it seems, in all cases where the meaning and intention of the framers is by law to be collected from the document itself; as in the instances of judicial records, deeds, &c.^q but where the meaning is to be judged of by the aid of extrinsic circumstances, the construction is usually a question of fact for the jury.^r Thus in the case of libel, the meaning of the writer and the truth of the inuendos are questions of fact. So in a prosecution for sending a threatening letter, the question, whether it contains a threat, if doubtful, is to be decided by the jury.^s But where there is evidence of facts, as well as documentary evidence from which the nature of a contract is to be derived, the question, what was the contract between the parties, is for the jury.^t If the context shows that a word is not used in its primary or strict sense, the judge may adopt the construction *indicated by the context; or if the surrounding circumstances at the time the instrument was made, show that the [*787

^m See tit. NEGLIGENCE.

ⁿ *R. v. Coode*, 4 Burn. 145, 26th edit.; *R. v. Justices of the East Riding of Yorkshire*, *ibid.*; *R. v. Justices of Essex*, 1 B. & Ald. 210; *R. v. Watts*, 7 Ad. & E. 461; E. C. L. R. 34.

^o *Per Buller, J.*, in *Walker v. Burnell*, Doug. 317; *Lingham v. Biggs*, 1 B. & P. 82; and *per Lawrence, J.*, in *Horn v. Baker*, 9 East, 241; *Watson v. Peache*, 1 Bing. N. C. 327; E. C. L. R. 27. But it is not unfrequently a question of law; see tit. BANKRUPTCY.

^p *R. v. Everett*, 8 B. & C. 114; E. C. L. R. 15.

^q See *supra*, p. 648, *et seq.*

^r Any ambiguity on the face of a document must be explained by the Judge, but if it arise from extrinsic evidence it must be construed by the jury; *Smith v. Thompson*, 8 C. B. 44; E. C. L. R. 65.

^s *Girdwood's case*, Leach, C. C. L. 42; and see *Tyler's case*, Moo. C. C. 428.

^t *Moore v. Garwood*, 4 Ex. 681.

parties intended to use the word in some secondary meaning, the judge may construe it according to such intention of the parties. But if there is evidence that the word was used in a sense peculiar to a trade, business, or place, or if its meaning depends upon the usage of the place where anything under the instrument is to be done, the jury must say whether the parties have used it in that peculiar sense. They must also give the meaning of some technical words.^u Where an agreement is not contained in any formal instrument, but is collected from letters which have passed between the parties, their construction, where their terms are plain and unambiguous, is also for the consideration of the court; but where they are written in so dubious and uncertain a manner as to be capable of different constructions, and can be explained by other circumstances, it is for the jury to decide on the whole of the evidence.^v And it seems that in general, where the evidence of a contract is matter of inference from circumstances, it is a matter of fact for the jury.

*788] It is the peculiar province of the jury to draw the proper conclusion in fact from mere circumstantial evidence of the fact, and to deduce the proper inference in all cases of indirect evidence, except in those instances where the law makes particular facts the foundation of a legal presumption; and even in such instances, where the legal presumption is not conclusive, it is still for the jury to decide on the evidence whether the legal *primæ facie* presumption or intendment is repelled by contrary evidence.

It also belongs to the court to decide all collateral matters arising in the course of the trial. Thus it is for the court in all cases to determine upon the competency of witnesses, and the admissibility^w

^u *Simpson v. Margitson*, 11 Q. B. 23; E. C. L. R. 63; *Hitchin v. Groom*, 5 C. B. 515; E. C. L. R. 57; *Neilson v. Harford*, 8 M. & W. 806; *Hutchison v. Bowker*, 5 M. & W. 535; *Morrell v. Frith*, 3 M. & W. 402; see *supra*, p. 701, *et seq.*

^v *Per Buller, J., Macbeath v. Haldimand*, 1 T. R. 182. Note, that Willes, J., in the same case, was of opinion that the construction of letters generally was proper for the jury; but Buller, J., intimated his dissent from the general proposition; and see *Baildon v. Walton*, 1 Ex. 617; *Morrell v. Frith*, 3 M. & W. 402. In *Stammers v. Dixon*, 7 East, 200, where the question was whether land was parcel of the plaintiff's freehold or the defendant's copyhold, and evidence was given of acts of ownership, and copyhold admissions, it was held that the effect of the admissions was matter of law for the Court; and the result of that case seems to be, that the jury were to find upon the whole of the case, giving effect, as far as the documents were concerned, to the construction put upon them by the Court.

^w *Per Tindal, C. J., Lewis v. Marshall*, 7 M. & G. 743; E. C. L. R. 49.

of particular evidence with reference to the facts in issue, or to the allegations on the record, even although the admissibility of the evidence should depend on matter of fact. And questions upon such matters cannot be put to the jury.^a Even if a preliminary question arises, as, for instance, whether a person be an agent of one of the parties or no, in order to let in evidence of admission made by him, the Judge must decide it, although it may afterwards be a question for the jury in order to dispose of an issue in the cause.^a And in all cases the question whether evidence be admissible or not is a question to be decided by the judge alone, although, after it is admitted, its credibility and weight are questions for the jury, who in so doing consider all the circumstances of the case, including of course those upon which the judge has decided that the evidence was admissible.^b

Various instances of the application of this principle have occurred. Thus it has been held that it is a question for the court, whether a declaration made by one *in articulo mortis* be admissible under the circumstances of the case.^c So, where the question was upon the sufficiency of the stamp on a bill of exchange, which depended upon the further question whether it was a foreign bill which it purported to be, or an inland one as the defendant asserted, it was held that it was the duty of the judge to decide this question.^d Where the question was whether a witness was competent or not on the ground of sanity, Parke, B., after taking the opinion of the judges, tried the question of sanity, and admitted the witness.^e The judge must try whether a person, whose declarations on a question of pedigree are tendered in evidence, is proved to have been a member of the family.^f And where declarations are offered in evidence as made by a party to the suit, the judge should determine his identity.^g So he must try whether a particular contract is of such

^a *Doe dem. Jenkins v. Davies*, 10 Q. B. 323; E. C. L. R. 59.

^a *Per Erle, J.*, in *Doe v. Davies*, 10 Q. B. 322; E. C. L. R. 59; *Welstead v. Levy*, 1 M. & Rob. 138.

^b *Lewis v. Marshall*, 7 M. & G. 743; E. C. L. R. 49; *Phillips v. Cole*, 10 A. & E. 112; E. C. L. R. 37.

^c So held by all the Judges; see *R. v. Hucks*, 1 Stark. C. 523; E. C. L. R. 2; *Major Campbell's case*, quoted by Parke, B., in *Bartlett v. Smith*, 11 M. & W. 486; see tit. ADMISSIONS.

^d *Bartlett v. Smith*, 11 M. & W. 483.

^e *Per Parke, B.*, in *Cleave v. Jones*, 21 L. J., Ex. 106.

^f *Doe v. Davies*, 10 Q. B. 314; E. C. L. R. 59.

^g *Corfield v. Parsons*, 1 C. & M. 730.

a usual character as to let in evidence of a custom of trade to control its terms.^h So he must inquire into and decide the question, whether the attempts to find an attesting witness have been sufficient to admit proof of his handwriting,ⁱ or whether proper search has been made for a document to let in secondary evidence,^k or whether the custody of an ancient document was proper.^l So where the plaintiff had been the attorney of the defendant, the judge decided the question whether a book tendered by the plaintiff in evidence came to him as a privileged communication from the defendant.^m Whether different portions of land are so *con-
*790] nected as to make acts done upon one of them evidence of rights over another, and also whether such acts amount to evidence of ownership,ⁿ are likewise questions which the court must decide. The evidence tendered upon such questions, indeed, is not in any way for the jury, the testimony ought to be given upon the *voir dire*; and if amongst the matters, upon which the question whether secondary evidence is admissible or not depends, there be a letter, the judge will not have it read before the jury, but will read it himself, and hand it to the opposite counsel.^o

It is also the province of the court to decide all matters which depend on an inspection of the record.^p

The court it has been said will, *ex officio*, exclude illegal evidence, without regard to the compact of counsel.^q

A party who is dissatisfied with the decision of the court in point

^h *Lewis v. Marshall*, 7 M. & G. 729; E. C. L. R. 49; and see *supra*, p. 701.

ⁱ *Supra*, p. 514.

^k *Supra*, p. 536.

^l *Bishop Meath v. Marquis of Winchester*, 3 Bing. N. C. 183; and see *supra*, p. 536; E. C. L. R. 32.

^m *Cleave v. Jones*, 21 L. J., Ex. 105.

ⁿ *Doe v. Kemp*, 7 Bing. 336; E. C. L. R. 20.

^o *Smith v. Sleap*, 1 C. & K. 48; E. C. L. R. 47.

^p *R. v. Hucks*, 1 Stark. C. 522; E. C. L. R. 2. Note, the question there was, whether a word in a record was *meeting* or *mutiny*.

^q *Shaw v. Roberts*, 2 Stark. C. 455; E. C. L. R. 3. But see on this subject *Barbat v. Allen*, 21 L. J., Ex. 155, where the subject underwent considerable discussion, and it would seem that in ordinary cases, if no objection be made, the evidence ought to be received; but if the objection be once made, it is purely discretionary with the Judge whether he will allow it to be withdrawn. The parties cannot, it has also been said, by private stipulation bind a court of justice not to call for that proof which law has rendered necessary. They cannot make proof of the policy sufficient, where the stat. 19 Geo. II., c. 37, prohibits the recovery without further proof than the policy; *Hodgson v. Glover*, 6 East, 321. Yet it is difficult to say that a party in a civil controversy, who may waive the proof by omitting to deny an allegation, may not dispense with proof at the trial.

of law may either tender a bill of exceptions, or, which is the more modern practice, may afterwards move for a new trial.

A bill of exceptions is founded upon some objection to the direction of the judge at *nisi prius*, or the court upon a trial at bar^r to the jury, or their decision as to *the admissibility of evidence,^s [*791 or the competency of witnesses,^t or improperly allowing or refusing a challenge of the jury,^u or refusing a demurrer to evidence.^x The *stat. 13 Edw. I. s. 31, enacts that “when one,^y [*792

^r *Rowe v. Brenton*, 3 M. & R. 266; E. C. L. R. 17.

^s *Thurston v. Slatford*, Salk. 284. If the contention be whether the facts proved tend to prove the issue, the party objecting ought to demur to the evidence; *Bulkely v. Butler*, 2 B. & C. 445; E. C. L. R. 9.

^t *Bent v. Baker*, 3 T. R. 27. For improperly directing a nonsuit; *Strother v. Hutchinson*, 4 Bing. N. C. 83; E. C. L. R. 33; *Corsar v. Reed*, 21 L. J., Q. B. 18, *post*, p. 807, note (x). So if the Judge tell the jury that there is evidence where there is none; *Bulkely v. Butler*, 2 B. & C. 445; E. C. L. R. 9. Where the reception of evidence depends upon some fact which is disputed, and of which the Court and not the jury is the proper judge, it may be very doubtful whether the decision of the Judge can afterwards be brought in question by means of a bill of exceptions; for this would be to constitute the Court of Error a court for deciding, not upon the law, but upon the fact, and that, too, in a case which might depend altogether on a balancing of the credit due to conflicting testimony. In *Bell v. The Hull and Selby Railway Company*, 6 M. & W. 699 (1840), one of the questions was, whether the Judge at *nisi prius* had properly rejected a witness tendered for the defendants on the ground of interest, the witness having stated that he had been a shareholder, but that he had a few days before assigned his shares to the treasurer of the Company in order to qualify himself to be a witness, that he conceived himself to have transferred his interest, and that he had to rely only on the honour of the transferee for a re-transfer, but that in case of refusal he should apply to a Court of Equity for redress. The Judge had rejected the witness on the ground that the transaction was merely collusive. For the plaintiff, it was contended (*inter alia*) that the question, whether the transaction was collusive or not, was one of fact for the Judge at *nisi prius*, and that his decision could not be questioned in *Banc*, any more than if the question had been raised upon a bill of exceptions tendered. But the Court intimated that the decision of the Judge might be questioned on a motion for a new trial, although not upon a bill of exceptions tendered; and see *Wright v. Doe dem. Tatham*, 7 Ad. & El. 356; E. C. L. R. 34; and the observations, *ib.*, of Tindal, C. J., on the case of *The Bishop of Meath v. The Marquis of Winchester*, 3 Bing. N. C. 183; E. C. L. R. 32; *Doe dem. Norton v. Webster*, 12 A. & E. 442; E. C. L. R. 40. On a bill of exceptions the question of fact always goes to the jury; *Miller v. Warre*, 1 C. & P. 239; E. C. L. R. 12.

^u *Strother v. Hutchinson*, 4 Bing. N. C. 83; E. C. L. R. 33.

^x *Cort v. Bishop of St. David's*, Cro. Car. 341; *Gibson v. Hunter*, 2 H. Bl. 208; *Strother v. Hutchinson*, 4 Bing. N. C. 90; E. C. L. R. 33.

^y The stat. extends to a plaintiff as well as a defendant; 2 Inst. 427.

that is impleaded² before any of the justices, doth allege an exception, praying that the justices will allow it, which if they will not allow, if he that hath alleged the question do write the same exception, and require that the justices will put their seals for a witness, the justices shall do so; and if one will not another of the company shall;³ and if *the king, upon complaint made of the justices, cause the
 *793] record to come before him, and the same exception be not found in the roll, and the party show the exception written, with the seal of the justice affixed, the justice shall be commanded that he appear at a certain day to confess or deny his seal, and if the justice cannot deny his seal, judgment shall be given according to the exception, as it may be allowed or disallowed." If the judge admit the matter to be evidence, but not conclusive, where in point of law it is conclusive, the course is to demur to the

* The words are, *si aliquis implacitetur*; hence it has been said that does not apply in a criminal case; *Sir H. Vane's case*, 1 Keb. 384; 1 Lev. 68; *R. v. Broughton*, Str. 1229; *Lord Grey's case*, 1 Vern. Ch. Cases, 175. It does not lie on an indictment for treason or felony; 2 Haw. c. 46, s. 210; *Sir H. Vane's case*, 1 Keb. 324.

But it has been allowed on an indictment for trespass; *R. v. Lord Paget*, 1 Leon. 5. And also on an information in the nature of a *quo warranto*; *R. v. Higgins*, 1 Ventr. 366; *sic R. v. Nutt*, 1 Barn. 307. It does not lie before justices on the trial of an appeal; *R. v. Inhabitants of Preston*, 2 Str. 1040. Nor in any case where a writ of error does not lie; B. N. P. 316. The stat. extends to a trial at bar, as well as to one at *nisi prius*; *Thurston v. Slatford*, 3 Salk. 155; *Davies v. Lowndes*, 1 M. & G. 473; E. C. L. R. 39; *contra, R. v. Smith*, 2 Show. 287.

Lord Coke says, the stat. extends to all actions, real, personal and mixed, but makes no mention of criminal cases. Lord Hardwicke considered this to be a point not then settled; *R. v. Inhabitants of Preston, supra*. He said, a bill of exceptions had been allowed in informations in the Exchequer, which are civil suits for the King's debt; but that it had never been determined to lie in mere criminal proceedings, *ib.*; and see *R. v. Stratton and others*, Howell's St. Tr. vol. 21, p. 1045. It has been held that it does not lie on the trial of a feigned issue out of Chancery; *Bullen v. Michel*, 2 Price, 416, Wood, B., *dissentiente*; *Armstrong v. Lewis*, 3 M. & K. 52; or a feigned issue under the Tithe Commutation Act; *Thorpe v. Plowden*, 2 Ex. 387. Nor does it lie on an interpleader issue; *King v. Simmonds*, 7 Q. B. 289; E. C. L. R. 53; *Snook v. Mattock*, 5 Ad. & E. 239; E. C. L. R. 31. It is much doubted whether it lies on a writ of inquiry; *Price v. Green*, 16 M. & W. 346. But it lies on the direction of a sheriff to a jury in the county court; *Strother v. Hutchinson*, 4 Bing. N. C. 83; E. C. L. R. 33; and on an issue out of the Admiralty Court; 3 & 4 Vict. c. 65, s. 15.

* It must be sealed by the Judge who tried the cause; *Newton v. Boodle*, 3 C. B. 795; E. C. L. R. 54; or by one in the commission; no other can do so, even by consent; *Nind v. Arthur*, C. P. 1 Chitty's Stats. by Welsby, p. 307.

evidence,^b because (as it is said), although the evidence be conclusive, the jury might formerly hazard an attaint if they pleased;^c as where the judge leaves it to the jury whether the probate of a will be evidence to prove the bequest of a term for years.^d The statute is silent as to the time of tendering the bill, but it has been held, on reason and principle, that it must be done at the trial, for the party may have misled his adversary by not insisting on the objection at the time;^e if he stood upon his exception the adversary might have had more evidence, and need not have put his cause upon that point. It need not, however, be put in form then, although the substance of it *ought to be put into writing, since it is [*794 to become a record.^f

If the bill be annexed to the record, it begins with the proceedings after issue joined, and proceeds to state the circumstances upon which it is founded: that a particular witness was called to prove certain facts, or evidence offered to prove such facts,^g or challenge

^b See Demurrer to Evidence, *infra*, p. 797.

^c See Tidd, Pr. 863, 9th edit.

^d *Chichester v. Philips*, T. Raym. 405; T. Jon. 146.

^e *Wright v. Sharpe*, 1 Salk. 288. Where the exceptions were placed upon the record after the finding of the jury, the Court of Error could not give judgment thereon; *Armstrong v. Lewis*, 2 C. & M. 275. Where they erroneously appeared to have been taken after verdict, the Court of Error amended the record in this respect; *Cully v. Taylerson*, 11 A. & E. 1008; E. C. L. R. 39; and a party is entitled to a reasonable time, to seal his bill of exceptions and sue out his writ of error; therefore where the plaintiff had signed judgment in such a case, the court would not compel the defendant to enter upon the record that the bill was sealed after judgment signed; *R. v. Rowley*, 2 D. N. S. 335.

^f *Per* Holt, C. J., 1 Salk. 288; Tidd, Pr. 863, 9th edit.

^g It should contain so much of the evidence as is necessary to make the exceptions intelligible to the Court of Error, and to furnish grounds for the allowance or disallowance of the exception; *Davies v. Lowndes*, 1 Scott, N. R. 328. And where part of a lease was inserted amongst the evidence by way of extract, the House of Lords held that no other part of the lease could be referred to; *Galway v. Baker*, 5 Cl. & F. 157, App. Where the object for which evidence is offered, but rejected, is obvious, and must have been understood by the judge and the jury, it is not necessary that the object should be specially stated; *Doe v. Earl of Jersey*, 3 B. & C. 870; E. C. L. R. 10. In the case of *Bulkely and others v. Butler*, in error, 2 B. & C. 434; E. C. L. R. 9, where the question on which a bill of exceptions was tendered was, whether there was sufficient evidence that the bill on which the action was brought was indorsed by *E. S.* the payee, the record, when brought into the Court of K. B., after setting out the pleadings and continuances, stated that on a certain day the cause came on to be tried; that one *W. B.* was produced and examined as a witness for the plaintiff, and stated that, &c.; on cross-examination, he stated that, &c.; (see the evidence, tit. BILL OF Ex-

795] made, or demurrer tendered; the allegations of counsel on the admissibility or effect of evidence; the opinion of the court or judge,^h and the exception of counsel to that opinion, and the verdict of the jury.ⁱ Where the bill is not annexed to the record, it is necessary to set out the whole of the proceedings previous to the trial.^k If the bill be sealed, both parties are bound by it, and cannot aver the contrary, or supply an omission in it.^l

The judge either sets his seal to the exceptions, or refuses to

CHANGE;) and then, upon no other evidence being adduced of the person calling himself *E. S.* being the payee of the said bill in the declaration mentioned, the counsel for the defendant objected to the evidence so given as aforesaid by the said plaintiff in support of the said issue joined between the said parties, and that there was no proof to go to the jury of the identity of the said person calling himself *C. S.* with the said *E. S.* the payee of the said bill; and then and there prayed the said Chief Justice, that he would declare to the jury that there was no evidence before them of the indorsement of the said bill of exchange by the payee before mentioned; yet the said Chief Justice did then and there declare and deliver his opinion to the jury aforesaid, that although in law there should be some proof of the identity of the person making the indorsement, still it ought not to be so rigidly followed up as to clog the negotiability of bills of exchange; and the said Chief Justice did further deliver his opinion, that the said evidence above set forth was reasonable evidence to be left to the jury, whether the said indorsement was the indorsement, &c.; and thereupon, with that direction, left the same to the jury, who declared themselves to be satisfied of the identity of the said *E. S.*; concluding in the usual form. Holroyd, J., in giving judgment, observed, the real question was, "whether this evidence was or was not admissible, either as containing the declarations of persons not called as witnesses, or as having no tendency to prove the matters in issue. If the objection was known *a priori*, it should have been made before the evidence was given; but if it was not discovered till afterwards, then the judge should have been requested to strike the evidence out of his notes; and if after that he persevered in summing it up to the jury, that would have been a good ground for tendering a bill of exceptions; but if, as appears to me to have been the case, the contention was whether, admitting the facts deposed to, they tended to prove the issue, there should have been a demurrer to the evidence." The judgment was affirmed.

^h It is not enough to state in the bill that the judge declined to direct the jury in the way suggested, without showing what his direction actually was; *M. Alpine v. Mangnall*, 3 C. B. 496; E. C. L. R. 54.

ⁱ Matters preliminary to their verdict, and which they were not bound by law to find, cannot be introduced together with the verdict, although found by them together therewith; *Davies v. Lowndes*, 1 M. & G. 473; E. C. L. R. 39; Tidd, Pr. 862, 9th ed.; *Hickell v. Money*, B. N. P. 317; *Fabrigas v. Mostyn*, 11 St. Tr. 187; *Money v. Leach*, 3 Burr. 1692 and 1742.

^k B. N. P. 317.

^l *Bridgman v. Holt*, Show. Pr. C. 120; *Lord Trimlestown v. Kemmis*, 9 Cl. & F. 749.

do so because the bill contains matters which are not true.^m On refusal, the party may have a writ *founded on the statute, [*796 containing a surmise of an exception taken and overruled, and commanding the justices, that if it be so, they put their seals to the bill.ⁿ If they return *quod non ita est*, an action lies for a false return, in which the surmise may be tried; and if it be true, the plaintiff recovers damages, and a peremptory writ issues.^o

The bill of exceptions, when sealed, is not used until judgment has been signed, and a writ of error brought to remove the proceeding into the court above,^p for the proceeding is in the nature of an appeal.^q On the return of the writ of error, the judge being called on by the court, either confesses or denies his seal; if he confess it, the proceedings are entered of record, and the other party assigns error; if he denies his seal, the plaintiff may take issue upon it, and prove it by witnesses.^r

The court will not grant a motion for a new trial where a bill of exceptions has been tendered, unless the bill of exceptions be abandoned.^s It seems to be otherwise where the new trial is applied for upon another point, and that point could not have been included in the bill of exceptions.^t And a bill of exceptions is waived by bringing a writ of error before the judge's signature has been obtained, and the party will then be precluded from appending the bill to the writ of error.^u Where the *ob- [*797 jection is to the reception of evidence is inadmissible, the party ought, if aware of the objection, to object to its reception;

^m *Bridgman v. Holt*, Show. Parl. C. 120.

ⁿ 2 Inst. 427; B. N. P. 316; *Lawlor v. Murray*, 1 Sch. & Lef. 75; *Registrum Brev.* 182.

^o 2 Inst. 427; Tidd, Pr. 864, 9th ed.

^p *Davenport v. Tyrrell*, 1 Bl. R. 679; *Symmers v. Regem*, Cowp. 501; 3 Bl. Com. 372; see *Enfield v. Hills*, 2 Lev. 236.

^q 3 Bl. Com. 372.

^r 2 Inst. 428.

^s *Doe d. Roberts v. Roberts*, 2 Chitty's R. 272.

^t *Crotty v. Price*, 15 Q. B. 1003; E. C. L. R. 69; *Adams v. Andrews*, *ibid.* 1001.

^u *Dillon v. Parker*, 1 Bing. 17; E. C. L. R. 8. But where a bill of exceptions had been sent to the plaintiff, that he might agree to it or suggest alterations before being signed by the judge, and on the same day the defendant sued out a writ of error, it was held, that notwithstanding this the plaintiff was bound to express his assent or dissent, and return it; *Willans v. Taylor*, 6 Bing. 512; E. C. L. R. 19; and the bill of exceptions not having been ready when the writ of error was returned, the court, under the circumstances, ordered it to be tacked to the record; *Taylor v. Willans*, 2 B. & Ad. 846; E. C. L. R. 22.

if not apprised previously, he ought, after it has been received, to request the judge to strike it out of his notes, and if the judge persist in retaining it and stating it to the jury, the proper course is to tender a bill of exceptions; but if the contention is, whether the evidence, being admissible, tends to prove the issue, the proper course is to demur to the evidence.^x

The Court of Error may look into the whole of the matters set out on record, to enable them to pronounce their judgment:^y and if they see that there was a misdirection calculated to mislead the jury in their verdict, they have no discretion, but must allow the exception and direct a new trial, even although the verdict be right.^z

A party who admits the facts which the adverse evidence tends to prove, but desires to withdraw the application of the law of those facts from the jury, and to submit them for that purpose to the court above, is at liberty to do so by his demurrer to the evidence.^a But his demurrer cannot be allowed, unless he admit upon the record the truth of the facts which the evidence of his adversary, though it be but presumptive or circumstantial, tends to *798] prove.^b For though he has a right to submit the legal *effect of the facts to the judgment of the court, yet, as the jury are the proper judges of matters of fact, the evidence must either be submitted to the jury, or the facts themselves which the evidence conduces to prove must be admitted.^c The judge, it seems, may overrule the demurrer if he think proper, and leave the case to the jury.^d

^x *Bulkely v. Butler*, 2 B. & C. 434; *supra*, p. 794; E. C. L. R. 9.

^y *Vines v. The Corporation of Reading*, 1 Y. & J. 4; *Smith v. Latham*, 1 C. & M. 568. If the court decided in favour of the objection, they would either award a *venire de novo* or reverse the judgment, but they cannot award a *venire de novo* to an inferior court; *Strother v. Hutchinson*, 4 Bing. N. C. 83; E. C. L. R. 33.

^z *Househill Coal Company v. Neilson*, 9 Cl. & F. 788. This otherwise in case of a motion for a new trial; *Ibid*.

^a This proceeding is nearly obsolete, no instance of it having occurred in practice for many years.

^b *Gibson v. Hunter*, 2 H. B. 187; *Wright v. Pindar*, Alleyn, 18; *Cocksedge v. Fanshaw*, Doug. 119.

^c *Ibid.*; and see *Baker's case*, 5 Co. 103; B. N. P. 314. But on a demurrer to evidence, the court may draw the same inference as a jury would have drawn; *Tatlock v. Harris*, 3 T. R. 174; *Vere v. Lewis*, 3 T. R. 182. No objection can be taken to the pleadings; *Cort v. Birkbeck*, Doug. 218.

^d *Worsley v. Filisker*, 2 Roll. R. 119.

And if in the case of an information or any other suit, where the King is a party, evidence be given for the King, it is said that the King's counsel cannot be compelled to join in a demurrer to the evidence, but that in such a case, the court ought to direct the jury to find the special matter.^e

Where the demurrer is allowed, the usual course is for the court to give order to the associate to take a note of the evidence, which is signed by counsel, and affixed to the *postea*.^f But if the court overruled the demurrer improperly, the party may tender a bill of exceptions.^g

A demurrer to evidence lies in an inferior court.^h

The ancient practice of tendering bills of exceptions, in demurring to the evidence,ⁱ has in a great measure been superseded by the more modern^k practice of moving* the court for a new trial; in the granting or refusing of which the courts exercise a discretionary power according to the exigency of the case, upon principles of substantial justice and equity.^l [*799

The two principal grounds for this motion, with reference to the present subject, are,

- 1st. Some misdirection or misruling on the part of the judge; or,
- 2dly. Error or misconduct on the part of the jury.

First, a new trial will be granted where the judge has misdirected the jury upon a matter of law; as where he states to the

^e *Baker's case*, 5 Co. 104; B. N. P. 313.

^f B. N. P. 313. The damages may be assessed conditionally; or if necessary, a writ of inquiry may be executed after the court has given judgment; B. N. P. 314; *Herbert v. Walters*, 1 Ld. Raym. 60; *Newys v. Larke*, Plowd. 408; *Darrose v. Newbott*, Cro. Car. 143; and *Miller v. Warre*, 1 C. & P. 329; E. C. L. R. 12.

^g *Gibson v. Hunter*, 2 H. B. 208, *supra*, p. 797.

^h As in the Palace Court; *Fitzharris v. Boivin*, 1 Lev. 87.

ⁱ Formerly the party had a remedy against the jury by writ of attain, but this is now abolished.

^k See the observations of Lord Mansfield in the case of *Bright v. Eymon*, 1 Burr. 390, where he observed that a verdict can only be set right by a new trial, which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or rather a certainty, that justice has not been done; and see the judgment of Wood, B., in *Stevens v. Aldridge*, 5 Price, 352.

^l The rules by which the courts will be guided in granting new trials have become much more perfectly defined in modern times. In *Hughes v. Hughes*, 15 M. & W. 701, Alderson, B., said, that the court now regulates its discretion, as nearly as possible, by the rules applicable to bills of exceptions.

jury that the evidence does not prove an alleged custom, when the testimony of the witnesses, if believed, does prove the custom.^m

*800] *So if the judge reject evidence which ought to have been admitted, or admit that which ought to have been rejected.ⁿ

Formerly, the courts would not grant a new trial on the ground of the reception of improper evidence, where there was sufficient evidence without it to warrant the verdict.^o But it has since been determined, and seems now to be settled, that where evidence at the trial is improperly received, and its reception formally objected to, the adverse party has a right to a new trial;^p unless the court sees clearly that the improper evidence could not have weighed

^m *How v. Strode*, 2 Wils. 269; 2 Salk. 649. So if that be left to the jury, as an award by commissioners having jurisdiction, which is in fact evidence founded on the conduct and demeanour of the parties, and not an award or adjudication, the court will grant a new trial; *Jarrett v. Leonard*, 2 M. & S. 265. The court granted a new trial in a toll cause, where the judge had misdirected the jury as to the meaning of the term, *consuetudines*, in an ancient charter; *Earl of Egremont v. Saul*, 6 Ad. & Ell. 924; E. C. L. R. 33; and see *Elliott v. The South Devon Railway Company*, 2 Ex. 725. But it must be a misdirection as to some matter of law on which they ought to act, therefore the court refused to grant a new trial on the ground of misdirection by an under-sheriff in telling the jury, on a writ of inquiry in an action of slander, that any amount of damages would entitle the plaintiff to full costs; *Grater v. Collard*, 6 Dowl. P. C. 503. So they have refused, where the judge erroneously directed the jury that a fact need not be proved, which was by oversight supposed not to have been proved, but which in fact was proved by a document conclusive on the point, and admitted without objection; *Bessy v. Windham*, 6 Q. B. 166; E. C. L. R. 51; and see *Doe v. Penry*, 1 Anst. 266.

ⁿ *Thomkins v. Hill*, 7 Mod. 64. If therefore they said justice had been done, although there had been a misdirection in point of law, they would not set the verdict aside, nor discuss the legal question; *Edmondson v. Machell*, 2 T. R. 4. Nor will they now interfere where the whole case has been substantially left to the jury, although a point made at the trial, which could have been of no avail, has been omitted; *Robinson v. Gleadow*, 2 Bing. N. C. 156; E. C. L. R. 29. Nor can particular expressions be objected to, if the whole in substance lead to a just conclusion; *Gascoyne v. Smith*, M'Cle. & Yo. 338.

^o *Nathan v. Buckland*, 2 Moore, 153; E. C. L. R. 4; *Horford v. Wilson*, 1 Taunt. 12. Even, as it seems, in a criminal case; *R. v. Ball*, Russ. & Ry. C. C. R. 132; *Tinkler's case*, *ibid.*; 1 East, P. C. 354; *R. v. Treble*, Russ. & Ry. C. C. R. 166. Where the court saw that there was evidence *not merely enough* to warrant the finding of the jury, independently of that which was objected to as having been improperly received, but that it greatly preponderated in favour of the verdict, the court refused a new trial; *Doe d. Teynham v. Tyler*, 6 Bing. 561; E. C. L. R. 19.

^p *De Rutzen v. Farr*, 4 Ad. & Ell. 53; E. C. L. R. 31; *Wright v. Tatham*, 7 Ad. & Ell. 330; E. C. L. R. 34.

with the jury, or that a verdict, if given against the party who gave the evidence, would have been set aside as against evidence. If, too, evidence tendered has been improperly rejected, a new trial will be granted, unless, even had it been admitted, a verdict for the party tendering it would have been so clearly against the weight of evidence, that in like manner it would have been set aside by the court.^a

*But a new trial was refused to be granted on account of the rejection of a witness as incompetent, who was really [*801 competent, where the fact which he was called to prove was established by another witness, and was not disputed, and the verdict was given on a collateral point, on which the defence was rested.^r A new trial would also be refused, although evidence were rejected of a fact, if it was proved by other evidence, and admitted by the opponent.^s

On the ground of misdirection the court will grant a new trial, even in a penal action after a verdict for the defendant,^t or although the sum recovered should be less than £20.

If the plaintiff's counsel, however, at the trial acquiesces in the ruling of the judge, and in consequence the defendant takes a verdict without entering into his case, the plaintiff cannot afterwards move for a new trial on the ground of misdirection.^u And it rarely happens that the court will grant a new trial upon a point of law

^a *Crease v. Barrett*, 1 C. M. & R. 919. This decision was recognized in *Doe dem. Welsh v. Langfield*, 16 M. & W. 497, where, because the evidence wrongly rejected would not have advanced the case of the party applying, other and stronger evidence of the same fact having been received which rendered that rejected immaterial, a new trial was refused; and see *De Rutzen v. Farr*, and *Wright v. Tatham*, *supra*, p. 800.

^r *Edwards v. Evans*, 3 East, 451. If, too, in any of these cases, whether of misdirection, or improper reception or rejection of evidence, the party showing cause will concede the particular matter or question to which the direction or evidence applies, the other party is not entitled to a new trial; *Moore v. Tuckwell*, 1 C. B. 607; E. C. L. R. 50. Thus, where there were several issues, one of them on a plea of *liberum tenementum*, and the Judge improperly rejected evidence applicable to that issue only, the Court, after a verdict for the defendant on several other issues, discharged a rule for a new trial without costs to either party, on his consenting to a verdict for the plaintiff on that issue; *Hughes v. Hughes*, 15 M. & W. 701.

^s *Mortimer v. M'Callan*, 6 M. & W. 58; *supra*, note (q).

^t *Wilson v. Rastall*, 4 T. R. 753; *Calcraft v. Gibbs*, 5 T. R. 19.

^u *Robinson v. Cook*, 6 Taunt. 336; E. C. L. R. 1; and see *Morrish v. Murrey*, 13 M. & W. 52.

*802] which has not *been taken at the trial;^x and in no case where the objection, if taken, might have been removed by evidence.^y The court has refused to grant a new trial, to let the party into a defence of which he was apprised at the trial;^z as to give the defendant an opportunity of proving by way of defence the illegality of a policy of insurance.^a But where the defendant in an action on a policy failed to prove a breach of the Convoy Act, through the mistake of a witness who had failed in producing the necessary document from the Admiralty, the court granted a new trial after a verdict for the plaintiff on the merits.^b

Secondly, a new trial will be granted for error or misconduct of the jury.^c The courts, however, do not interfere* for the *803] purpose of granting new trials but in order to remedy some manifest abuse, or to correct some manifest error in law or fact.^d

^x *Ritchie v. Bousfield*, 7 Taunt. 309; E. C. L. R. 2. As that the evidence was not applicable to the particular thing it was tendered to prove, but to something else; *Ferrand v. Milligan*, 7 Q. B. 730; E. C. L. R. 53. Where no objection was made to the admissibility of evidence until the Judge commenced summing up, the Court afterwards refused a new trial on that ground; *Abbott v. Parsons*, 7 Bing. 563; E. C. L. R. 20; and see *Cox v. Kitchen*, 1 B. & P. 338, where the Court refused to set aside a verdict on a point of law not taken at the trial, where the justice and conscience of the case were with the verdict. If the Judge's note does not show that the point was taken at the trial, the Court will not allow it to be raised before them; *Doe v. Benjamin*, 9 Ad. & E. 649; E. C. L. R. 36; therefore counsel ought to make a formal tender of the evidence, and request the Judge to take a note of it; *Gibbs v. Pike*, 9 M. & W. 351.

^y *Malkin v. Vickerstaff*, 3 B. & Ald. 89; E. C. L. R. 5.

^z *Vernon v. Hankey*, 2 T. R. 113. But where, after a witness had been a short time under examination, the Judge expressed an opinion that the action could not be supported, and the plaintiff was nonsuited, a new trial was granted on the affidavit of the witness, to the effect that if not stopped he could have proved the plaintiff's case; *Edger v. Knapp*, 5 M. & G. 753; E. C. L. R. 44.

^a *Gist v. Mason*, 1 T. R. 84.

^b *D'Aguilar v. Tobin*, 2 Marsh. 265; E. C. L. R. 4.

^c As if the jury misapprehended the law; *Gregory v. Tuffs*, 1 C. M. & R. 310. So where the verdict is in contravention of the law, from a desire in the jury to take the exposition of the law into their own hands; *Attorney-General v. Rogers*, 11 M. & W. 670. So, in an action on a policy of insurance against fire, one of the conditions was a forfeiture of all benefit in case of fraud or false swearing as to the amount of loss claimed: the plaintiff claimed, and made an affidavit of damage to the extent of 1,085*l.*, and having sued for the amount, the jury, upon very suspicious circumstances of fraud, gave only 500*l.*; the Court, at the instance of the defendants, granted a new trial; *Levy v. Baillie*, 7 Bing. 349; E. C. L. R. 20.

^d Where the conclusion of the jury is a reasonable inference from the evidence,

Where there is a contrariety of evidence the court will not grant a new trial, unless it clearly appear that the jury have drawn an erroneous conclusion, even although there are circumstances in the case pregnant with suspicion, and which lead to a contrary conclusion, or although the verdict be contrary to the opinion and direction of the judge who tried the cause.^e

*Where the plaintiff is in conscience entitled to recover, the courts will not grant a new trial where he has obtained a verdict upon a presumption, although there be much evidence on the other side.^f [*804

It is matter of discretion with the court in *all* cases, whether the Court will not disturb the verdict, even in a criminal case; *per* Abbott, C. J., *R. v. Burdett*, 4 B. & Ald. 167; E. C. L. R. 6. In general, the Courts will not grant a new trial in case of a verdict against evidence, where the verdict is on the honest side of the cause; *per* Bathurst, J., in *Goslin v. Wilcock*, 2 Wils. 306; and he cited *Smith v. Page*, 2 Salk. 644, as a strong case to that effect. The plaintiff in ejectment had no legal title, but the Court refused to set aside a verdict found for him, he having an equitable right. If the verdict be manifestly against the justice of the case and the Judge's direction, the Court will grant a new trial without costs, though the damages be under 20l.; *per* Buller, J., in *Jackson v. Duchaire*, 3 T. R. 553. Where the jury found a verdict with 20s. damages, in a gross case of slander, the Court refused a new trial; *Rendall v. Hayward*, 5 Bing. N. C. 424; E. C. L. R. 35. And in general a new trial will not be granted where the verdict for the plaintiff is for a sum under 20l.; *Sowell v. Champion*, 6 Ad. & Ell. 407; E. C. L. R. 33; although the case be stated to be of importance, as relating to boundary jurisdiction. It is irregular in a jury to take with them, on retiring to consider their verdict, documents without leave of the Court; but if the document so taken be evidence on both sides, the taking it will not avoid the verdict; *R. v. Burdett*, Ld. Raym. 148. *Secus*, if it be evidence on one side only; *Lady Joy's case*, cited *ibid.*; Bro. Verd. pl. 19. It is not enough, in order to set aside a verdict, to show that printed papers tending to create prejudice against a party, even in a criminal case, were circulated by strangers; *R. v. Burdett*, 1 Ld. Raym. 148.

^e *Moore v. Taylor*, 1 Ad. & Ell. 25; E. C. L. R. 28; *Carstairs v. Stein*, 4 M. & S. 192. The question was, whether a commission of one-half per cent. on a banking account was usurious; and the jury decided that, under the circumstances, it was not. In like manner, where the sessions have found as a fact a contract of hiring for a year, the Court will not, if there be any premises from which that conclusion might be drawn, disturb that finding. Where, after the original hiring for less than a year, the pauper and her mistress varied the terms, from which it might be inferred that they contemplated that there should be a continuation of the service beyond the original period, the Court refused to disturb the decision of the sessions; *R. v. St. Andrew the Great, Cambridge*, 8 B. & C. 664; E. C. L. R. 15.

^f *Wilkinson v. Payne*, 4 T. R. 468.

they will grant a new trial for excessive damages.⁵ Where a plaintiff is entitled to recover for part of his demand, and is also entitled to recover the residue; but in a different form of action, the court will not reduce the damages, a verdict having been obtained for the whole demand.^a As a general rule, they will not grant a new trial in an action for unliquidated damages on account of the smallness of the damages.ⁱ

*805] *Where the verdict (under £20) was against the opinion of the judge and weight of evidence, the court nevertheless refused a new trial without payment of costs.^k

A new trial will not be granted after a verdict for the defendant upon an indictment for a misdemeanour, on the ground that the verdict was against evidence;^l nor in a penal action.^m

A new trial has been granted on an affidavit made by a material witness that he made a mistake in his evidence.ⁿ

It is a general rule that affidavits cannot be received from jurors to show on what grounds they acted.^o And although affidavits

⁵ *Ducker v. Wood*, 1 T. R. 277; *Jones v. Sparrow*, 5 T. R. 257; *Goldsmith v. Lord Sefton*, 3 Ans. 808; *Hewlett v. Crutchley*, 5 Taunt. 277; E. C. L. R. 1. A new trial will not be granted, on this ground, in an action for crim. con., unless it appear that the jury acted under the influence of undue motives, or of error and misconception; *Duberley v. Gunning*, 4 T. R. 651; *Chambers v. Caulfield*, 6 East, 244. Where, the defendant omitting to appear at the trial, the jury had, in a case of great aggravation of crim. con., given more damages than were laid in the declaration, the Court refused a new trial on any terms; *Masters v. Barnwell*, 7 Bing. 224; E. C. L. R. 20. The Court will sometimes direct the former verdict to stand as a security; *Pleydell v. Lord Dorchester*, 7 T. R. 529.

^a *Per Abbott, C. J., Mayfield v. Wadsly*, 3 B. & C. 357; E. C. L. R. 10.

ⁱ *Rendall v. Hayward*, 5 Bing. N. C. 424; E. C. L. R. 35; *Manton v. Bales*, 1 C. B. 444; E. C. L. R. 50; *Gibbs v. Tunaley*, *ibid.* 640.

^k *Scott v. Watkinson*, 4 M. & P. 237; and see Archbold's Prac. by Chitty, p. 1335, 8th ed.

^l *R. v. Mann*, 4 M. & S. 337; *R. v. Reynell*, 6 East, 315; *R. v. Sutton*, 5 B. & Ad. 52; E. C. L. R. 27; see *R. v. Bennett*, 1 Str. 101. But, under special circumstances, the Court has suspended the entry of a judgment after an acquittal on an indictment for not repairing a highway; *R. v. Wandsworth*, 1 B. & Ald. 63; see *Attorney-General v. Rogers*, *supra*, note (c), p. 802. It would seem that where rights may be compromised the Court will set aside the verdict; *R. v. Cohen*, 1 Stark. C. 516, note; E. C. L. R. 2; see *per Parke, B.*, 5 B. & Ad. 53; E. C. L. R. 27.

^m *Brook v. Middleton*, 10 East, 268.

ⁿ *Richardson v. Fisher*, 1 Bing. 145; E. C. L. R. 8.

^o *Burgess v. Langley*, 1 D. & L. 21, C. P.; *Harvey v. Hewitt*, 8 Dowl. 598. Where the Judge, being of opinion that the plaintiff had made out no title, directed a verdict for the defendant; and the jury being present, and no objection

may be admissible when made by jurors as to what is done openly in court,^p yet it was observed by the court, that the information had better be derived from some other source;^q and the judge's notes on such point is conclusive.^r The delivery of food to a retired jury, without showing that it was done by a party to the cause, or that the refreshment had the effect of carrying the verdict, is not a sufficient ground for setting aside the verdict.^s [*806

The doctrine of nonsuits is founded on the ancient practice, according to which a plaintiff was bound by himself or his attorney^t to appear at the trial, prosecute his suit, and hear the verdict; and in case, after being called, he made default, he was decreed to have abandoned his suit, and was *nonsuited*.^u

This ancient practice has long been used as the medium by which the court intimates an opinion that the plaintiff has not made out a sufficient case for the consideration of the jury. The plaintiff is therefore formally called, although by himself or his counsel he has actually appeared in court. In conformity, however, with the old practice, being called, he may if he choose

made at the time of entering the verdict, the Court refused an application for a new trial on the affidavit of a juror that he had not concurred in the verdict; *Saville v. Lord Farnham*, 2 M. & Ry. 216; and see *Everett v. Youells*, 4 B. & Ad. 681; E. C. L. R. 24.

^p *Roberts v. Hughes*, 7 M. & W. 399.

^q *Everett v. Youells*, 4 B. & Ad. 681; E. C. L. R. 24. Upon the trial of an information for a seditious libel, the jury, after having retired, upon their return into court in order to deliver their verdict, it was uncertain whether all of them were within hearing of what was declared by their foreman; the Court held, that the Judge properly refused to interfere after the verdict was recorded, or to act upon a communication from any of them; but under such uncertainty, the Court would allow the defendant a new trial, if he were disposed to apply for it; *R. v. Wooler*, 6 M. & S. 366.

^r *Ibid.*; *R. v. Grant*, 5 B. & Ad. 1081; E. C. L. R. 27; *Van Nyvel v. Hunter*, 3 A. & E. 243; E. C. L. R. 30; *Serjeant v. Chafy*, 5 A. & E. 354; E. C. L. R. 31. But although a record may be amended by the note of the Judge, it cannot be amended by his recollection; *R. v. Virrier*, 12 A. & E. 317; E. C. L. R. 40.

^s *Everett v. Youells*, 4 B. & Ad. 681; E. C. L. R. 24; see *Morris v. Vivian*, 10 M. & W. 137.

^t He may therefore be nonsuited at any time before verdict; 3 Bl. Com. 376.

^u See Co. Litt. 139. He may be nonsuited also on a demurrer; Co. Litt. 139, b. Where notice of trial has been countermanded after the commission day, but the record is not withdrawn, the proper course is to nonsuit the plaintiff, and the defendant cannot move for the costs of the assizes, or take a verdict for the defendant; *Haworth v. Whalley*, 1 C. & K. 586; E. C. L. R. 41.

appear, and if he do, the case must go to the jury.* On the other hand, the *plaintiff may of his own accord and for his own
 *807] convenience elect to be nonsuited at any time before the jury have delivered their verdict,^r and in that case, he cannot afterwards be heard upon an application to set aside the nonsuit.^z

Where an objection is taken in the nature of a demurrer to the plaintiff's evidence, that, even admitting it to be true, it is insufficient in point of law, if the judges accede to the objection the usual course is to nonsuit^a the *plaintiff. But
 *808] in such case, if the objection be of a doubtful nature, it is usual for the judge, either to nonsuit the plaintiff, with leave to

^x *Watkins v. Towers*, 2 T. R. 281; *Dewar v. Purday*, 3 Ad. & E. 166; E. C. L. R. 30; *Stancliffe v. Clarke*, 21 L. J., Ex. 129. The proper course is for the plaintiff to appear and require the Judge to direct the jury in point of law in his favour, and if the Judge refuse to permit him to appear, and nonsuit him against his will, or refuse to direct the jury in his favour, the plaintiff may tender a bill of exceptions and bring a writ of error; *Corsar v. Reed*, 21 L. J., Q. B. 18. The plaintiff's consent, express or implied, must always be had; 3 A. & E. 166, *supra*; E. C. L. R. 30. As the plaintiff cannot be nonsuited without consent, he may refuse to do so, unless the defendant will consent to terms, *e. g.*, that the Court above shall have the same power as to amending a variance that the Court of Nisi Prius had.

^y *Anderson v. Shaw*, 3 Bing. 391; E. C. L. R. 11; *Robinson v. Lawrence*, 21 L. J., Ex. 36; *Outhwaite v. Hudson*, *ibid.* 151.

^z *Simpson v. Clayton*, 2 Bing. N. C. 467; E. C. L. R. 29. So if the plaintiff's counsel elect to be nonsuited on an intimation from the Court that he is entitled to nominal damages only; *Butler v. Dorant*, 3 Taunt. 229; *Hancock v. Podmore*, 1 B. & Ad. 265; E. C. L. R. 20. Or if he do so on the Judge's proposing to leave two questions to the jury, one of which is material, and of which there is *primâ facie* evidence; *K. B. Trin. T. 1830*.

^a Where two issues were found for the plaintiff and two for the defendant, with liberty reserved to the latter to move for a nonsuit, if the Court should think the issues found for the plaintiff immaterial, which was acquiesced in at the trial by the plaintiff's counsel; held, that a nonsuit might be entered, notwithstanding the finding of some of the issues for the defendant; *Shepherd v. Bishop of Chester*, 6 Bing. 437; E. C. L. R. 19.

A plaintiff may be nonsuited in an undefended action; *Halhead v. Abrahams*, 3 Taunt. 81; and after payment of money into Court; *Gutteridge v. Smith*, 2 H. B. 374; or after a plea of tender; *Anderson v. Shaw*, 3 Bing. 290. In replevin, although the cause is tried on the defendant's record; *Mann v. Lovejoy*, R. & M. 357; E. C. L. R. 21. So on trial by proviso; *Anderson v. Shaw*, 3 Bing. 290; E. C. L. R. 11. So where there are issues in law and fact, and the defendant has obtained judgment on the former; *Paxton v. Popham*, 10 East, 365. He cannot, it has been suggested, be nonsuited in an action where the issue is on the defendant; *Newhall v. Holt*, 6 M. & W. 662. Yet if he does not appear he certainly may; *Symes v. Larby*, 2 C. & P. 358; E. C. L. R. 12.

move to set aside the nonsuit and enter a verdict for the plaintiff for a sum agreed on or ascertained by the jury, or to permit the plaintiff to take a verdict, with liberty to the defendant to move to enter a nonsuit. This seems to be discretionary on the part of the judge, who usually decides according to the weight of his own opinion for or against the objection.

A plaintiff after a nonsuit may move without any leave reserved to set aside the nonsuit; but in that case, although the nonsuit was improper, the court will do no more than set aside the nonsuit.^b Upon such motion made without leave, if the nonsuit be not tenable on the objection urged at the trial, the court will not support it on another ground which was not urged, unless the objection be of such a nature as to be incapable of removal.^c But a defendant cannot move to enter a nonsuit without leave; and even, with leave, he will be confined to the objections founded upon defects in evidence taken at the trial; for had the further objection been then taken, the plaintiff might possibly have answered it by adducing further evidence.^d Where the nonsuit is *in invitum*, the plaintiff may without leave move to set it aside, although he make no request at the trial that the case may be left to a jury,^e and submit merely out of deference to the judge. The plaintiff, with leave reserved at the trial, may move to have a nonsuit set aside, and a verdict entered for him. *Such a reservation being made in open court, the tacit consent of the jury and defendant is to be implied.^f Leave is sometimes given to a defendant to move to set aside a verdict and enter a nonsuit. But this cannot be done without the plaintiff's consent; and, as the condition of such consent is that the case shall go to the jury,^g the defendant will not be entitled to have a nonsuit entered, unless the jury give a verdict.

The defendant cannot insist on a nonsuit after he has addressed

^b *Doe d. Lawrence v. Shawcross*, K. B. Hil. 1825. And unless the defendant at the trial has consented to leave being reserved for the plaintiff to move to enter a verdict, the Court can only grant a new trial.

^c *Ibid.*

^d *Driver v. Thompson*, 4 Taunt. 294.

^e *Alexander v. Barker*, 2 C. & J. 136; *Ward v. Mason*, 9 Price, 291; Garrow, B., *dissentiente*. But he cannot urge a ground of objection which he did not urge at the trial; *Waller v. Drakeford*, 1 Stark. C. 482; E. C. L. R. 2.

^f He should apply to the Judge to reserve to the Court the powers of amendment which he has under 3 & 4 Will. IV., c. 42, s. 23, which alike implied consent will enable him to do.

^g *Dewar v. Purday*, 3 Ad. & Ell. 166; E. C. L. R. 30.

the jury and examined witnesses.^b It has, as before mentioned, been held that a bill of exceptions lies if the judge improperly nonsuit.¹

After an untenable verdict for the plaintiff, no liberty to enter a nonsuit having been reserved, the court can only grant a new trial, for otherwise the defendant would be deprived of his right to tender a bill of exceptions.^k

Where the terms of a declaration are ambiguous, and taken in one sense will, but taken in another sense will not, support the verdict, and there is no evidence to support the allegation in the former sense, the proper course is (on leave given) to move to *810] enter a nonsuit.¹ *A plaintiff in *assumpsit* may be non-suited, although a co-defendant has let judgment go by default.^m

A verdict set aside in part, must be set aside for the whole.ⁿ

The practice of advising the jury as to the nature, bearing, tendency and weight of the evidence, although it be a duty which from its very nature must be, in a great measure, discretionary on the part of the judge, is one which does not yield in importance to the more definite and ordinary one of directing them in matters of law.^o The trial by jury is a system admirably adapted to the

^b *Roberts v. Croft*, 7 C. & P. 376; E. C. L. R. 32. A nonsuit for not giving material evidence within the county must be claimed at the trial; *How v. Pickard*, 2 M. & W. 373; and see as to this, *Clark v. Dunsford*, 2 C. B. 724; E. C. L. R. 52.

¹ *Strother v. Hutchinson*, 4 Bing. N. C. 83; E. C. L. R. 33; see *supra*, n. (x).

^k *Minchin v. Clement*, 1 B. & Ald. 252; *Mathews v. Smith*, 2 Y. & J. 426.

¹ Where the terms used in a declaration founded on a penal clause in a statute are ambiguous, they will after verdict be so construed as to sustain the verdict; *Lord Huntingtower v. Gardiner*, 1 B. & C. 297; E. C. L. R. 8; *Avery v. Hoole*, 2 Cowp. 825. And therefore where the declaration alleged in some counts the "giving money for voting," and there was no evidence of a previous agreement to give money, which was necessary to constitute the offence, the Court (leave having been reserved to move to enter a nonsuit) directed a nonsuit to be entered. For the declaration, to be sustainable, must be taken to import a previous agreement, and of that there was no evidence.

^m *Murphy v. Donlan*, 5 B. & C. 178; E. C. L. R. 11; *Jones v. Gibson*, *ibid.* 768; *Stuart v. Rogers*, 4 M. & W. 649. In *Revett v. Brown*, 2 M. & P. 18; E. C. L. R. 17; it was said this cannot be done in an action of tort; *sed vide Had-drick v. Heslop*, 12 Q. B. 267; E. C. L. R. 64.

ⁿ *R. v. Phillips*, 1 Burr. 305; *Bernasconi v. Farebrother*, 3 B. & Ad. 372; E. C. L. R. 23.

^o See 3 Comm. 375. When the evidence is gone through on both sides, the Judge, in the presence of the parties, the counsel, and all others, sums up the

investigation of the truth ; but in order to obtain the full benefit to be derived from the united discernment of a jury, it must be admitted to be essential that their attention should be skilfully directed to the points material for their consideration.

*CHAPTER III.

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THE DUTY OF THE JURY.

A JURY taken from the body of the community may well be presumed to be possessed of such knowledge and experience, derived from their intercourse with society, as will peculiarly fit them for the determination of all disputed facts arising out of the ordinary transactions of life. It must, however, be recollected, that jurors, unaccustomed as they usually are to judicial investigations, require, in complicated cases, all the aid which can be derived from the experience and penetration of the Judge, to direct their attention to the essential points, and enable them to arrive at a just conclusion. The law, in its wisdom, ultimately relies upon their integrity and understanding, but nevertheless anxiously prepares the way for a correct conclusion, by excluding from their consideration all such evidence as is likely to embarrass, mislead, or prejudice them in the course of their inquiry. So far the law proceeds by certain and definite rules. Much yet remains to be done of a nature which cannot be defined : to divest a case of all its legal incumbrances ; to resolve a complicated mass of evidence into its most simple elements ; to exhibit clearly the connection, bearing, and importance of its distinct and separated parts, and their combined tendency and effect, stripped of every extrinsic and superfluous consideration which might otherwise embarrass or mislead ; and to do this in a manner suited to the comprehension and understanding of an ordinary jury, is one of the most arduous as

whole to the jury, omitting all superfluous circumstances ; observing wherein the main question and principal issue lies ; stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon the evidence.

*812] well as the most important duties incident to *the judicial office.^a There is, perhaps, no instance in which the natural and acquired powers of the mind are more strikingly and beneficially exerted than in a court of justice, where a confused mass of evidence relating to an intricate case is, by the effort of a vigorous, acute, and comprehensive mind, reduced into regularity and order.

On the discharge of this great duty the dearest interests of society, the very issues of life and death, frequently depend.

To offer any remarks on this head would be irrelevant, as well as presumptuous. Some observations will, under another division, be made upon the force and weight of evidence, and on the general principles which relate to that branch of the subject.

The law, to use an ordinary phrase, has no scales wherein to *813] weigh different degrees of probability,^b still less to *ascertain what weight of evidence shall amount to absolute proof of any disputed fact.

Its business is to define, to distinguish, and to apply legal consequences to ascertained facts; but whether a fact be probable or improbable, true or false, admits of no legal definition or test. The principles on which the investigation and ascertainment of truth depend, are fixed and invariable, however the particular process prescribed by different systems of law for the purpose of investigation may vary.

As the power of discriminating between truth and falsehood

^a Notwithstanding the splendid advantages which in practice are known to emanate from this wise and venerable institution, it is not to be disguised, that in some, and those essential, respects, it is liable to objections, from which an ordinary tribunal, constituted of professional Judges, would be more likely to be free. Jurors are liable to prejudice and bias, and even partiality, from local and personal connection; their very prejudices in favour of right may frequently tempt them to put their oaths in peril, by their desire to act according to their own notions of justice, when those are at variance with defined and general, but wise rules of law; they act but casually; they have no professional character to sustain; they assign no reasons for their decisions; in effect they are not amenable for corrupt decisions; and it can rarely happen that their individual and personal characters are at stake. In many instances, too, they are ill suited, by their previous habits, to decide on the effect of legal instruments, and other matters involved in and complicated with legal rules and presumptions. If such objections were not in practice to be counteracted by the discretionary aid, advice and guidance of the presiding Judge, and if the errors and mistakes of juries were not to be subject to revision and correction, it must be admitted by its warmest admirers that this mode of trial would frequently be precarious and unsatisfactory.

^b *Infra*, note (c).

depends rather upon the exercise of an experienced and intelligent mind than upon the application of artificial and technical rules, the law of England has delegated this important office to a jury of the country.

One great advantage derived from this venerable institution is, that this mode of trial excludes a number of technical and artificial rules and distinctions, which, but for the complete and absolute separation of law from fact, would be sure to arise. Were the decision of facts to be constantly referred to the same individual, the frequent occurrence of similar combinations of facts would tempt him to frame general and artificial rules, which, when they were applicable, would save mental exertion in particular instances; and perhaps a laudable wish to decide consistently, and that fondness for generalizing which is incident to every reflecting mind, would tend to the same point, and would lead to the introduction of refined and subtle distinctions. A juror, on the contrary, called on to discharge his duty but seldom, possesses neither inclination nor opportunity to generalize and refine; unfettered, therefore, by technicalities, he decides according to the natural weight and force of the evidence.^c

*Although all questions of pure fact belong peculiarly to the province of a jury,^d who are to be guided in their decision by their conscientious judgment and belief, yet it is to be recollected, that in many instances the effect of particular evidence is the subject of legal definition and cognizance, as in the case of all legal presumptions resulting in particular facts. It will be proper,

^c Beccaria (sect. 14) thus expresses himself:—*Ma questa morale certezza di prove è più facile il sentirla che l'esattamente definirla. Perciò io credo ottima lege quella, che stabilisce assessori al giudice principale presi dalla sorte è non dalla scelta, per chè in questo caso è piu sicura l'ignoranza che giudica per sentimento, che la scienza che giudica per opinione.* Again he says, *Io parlo di probabilità in materia di delitti, che par meritar pena debbono esser certi. Ma svanira il paradosso, per chi considera che rigorosamente la certezza morale non è che una probabilità, ma probabilità tale che è chiamato certezza, perchè ogni uomo di buon senso vi acconsente necessariamente per una consuetudine, nata dalla necessità di agire ed anteriore ad ogni speculazione; la certezza che richiede per accertare un uomo reo è dunque quella che determina ogni uomo nelle operazioni più importante della vita.*

^d As to the discharging of a jury, where they cannot agree, see *Morris v. Davies*, 3 C. & P. 427; E. C. L. R. 14. There, on an issue out of Chancery in order to inform the conscience of the Chancellor, the jury could not agree, and the parties refusing to consent to discharge them, the Judge did so on his own responsibility.

therefore, in the first place, briefly to inquire to what extent a jury is restrained by legal rules ; and, in the next place, to make some general observations on the natural force and weight of evidence.

With a view to the first consideration, that is, how far the law itself interferes as to the force or measure of evidence, it is to be recollected, that except in the few instances where a jury determine by the actual evidence of their senses, all evidence is either, first, *direct* ; that is, where witnesses state or depose to facts of which they have had actual knowledge : or secondly, it is *indirect* ; and *indirect* evidence is either *artificial* or *natural*. *Artificial*, where the law, by arbitrary appointment, annexes to particular evidence a force or efficacy beyond that which naturally belongs to it ; as in the case of records, which for the sake of public convenience are usually made final *and conclusive evidence of the facts *815] recorded.* So in all instance of legal presumptions, whether they be absolute and conclusive^f, like the *præsumptiones juris et de jure* of the Roman law, or, as the *præsumptiones juris*, be operative only until they be rebutted by proof to the contrary : or such artificial evidence may be of a *conventional* nature, as where parties by deed or other written agreement constitute the particular instrument to be the appropriate expositor of their intentions, and the legal memorial of the facts which it contains. In these and some other instances the law prescribes the extent to which the evidence shall operate ; and in these and all other cases, where a rule of law intervenes, a jury is bound by that rule of law, even though it be in opposition to their own conclusion as to the truth of the fact drawn from all the circumstances. Or, secondly, the evidence is purely natural, where the jury decide according to the natural weight and effect of the circumstances, either by the aid of experience, where former experience supplies such natural presumptions, or by the aid of reason exercised upon the circumstances, or by the joint and united aid of experience and reason.^g

^e *Supra*, p. 742.

^f *Supra*, p. 747.

^g Sir W. Blackstone, 3 Comm. 371, following the example of Lord Coke, classes all circumstantial evidence as *violent*, *probable*, or *light* presumptions ; making no distinction between such inferences as result immediately in respect of some association pointed out by previous experience, and those which are derived by the aid of reason exercised upon the special circumstances. According to this classification, the presumption is *violent* where the circumstances necessarily attend the fact ; *probable*, where the circumstances *usually* attend the fact ; and *light* presumptions, or rash presumptions, are those which have no weight or validity at all. The last branch of the division seems to be wholly useless, for an inference of *no*

*Juries are bound by all the rules and presumptions of law, as far as they apply: they are to confine themselves strictly to the matters put in issue by the pleadings; they are bound by the admissions of the parties upon record; and although they are not bound by estoppels, as the parties might have been had the matter of estoppel been pleaded, yet they are usually bound by legal estoppels which could not have been pleaded, and also by all such matters in the nature of estoppels as in point of law conclude the parties. They are bound to give the proper legal effect to all instruments established by competent evidence, and to notice all matters which are noticed by the court; they are to be governed by the order of proof which the law prescribes, and their verdict must be founded on the evidence adduced in the cause. [*816]

It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge; for it could not be known whether the verdict was according to or against the evidence:^b it is very possible that the private grounds of belief might not amount to legal evidence.

And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined;* and if he privately state such facts it will be a ground of motion for a new trial.¹ It sometimes happens that evidence which is admitted for one purpose may be no evidence for another purpose, and in such

weight is a mere unwarrantable *assumption*. The division of all circumstantial evidence into circumstances which necessarily or usually attend such facts, is one of a questionable nature, inasmuch as it tends to confound those inferences which are the pure result of experience with those which result either from reason alone, exercised upon the circumstances, or upon reason and experience jointly. It is very possible that circumstances may supply moral proof, although not one of them be such as either *necessarily* or *usually* attends the fact; the inference may be entirely independent of associations founded on experience, and rest wholly upon the exclusive force and nature of particular circumstances. Thus, in an instance cited below, where a highway robber was struck on the face by the prosecutor with a key, and was identified by the complete impression which he bore on his face, the circumstance was conclusive, but it was neither a *necessary* nor an *usual* one, with reference to the fact to be proved.

^b 3 Comm. 375; And. 321; *Reg. v. Rosser*, 7 C. & P. 648; E. C. L. R. 32; *Manley v. Shaw*, Car. & M. 361; E. C. L. R. 41.

¹ And. 321.

case a jury is bound to apply the evidence so far only as it is legally applicable. Thus, if *A.* and *B.* be tried at the same time, a confession made by the one, but which criminales the other, ought not to operate with the jury against the latter.

Where the jury find a general verdict they are bound to apply the law as delivered by the court, in criminal as well as civil cases.

Previous to the remarks which will be made on the force and weight of evidence, whether direct or circumstantial, it is to be observed, that the measure of proof sufficient to warrant the verdict of a jury varies much, according to the nature of the case.

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact; absolute mathematical or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable.

Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favor of the particular fact.

The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the *purpose, unless it generate full belief
 *818] of the fact to the exclusion of all reasonable doubt.

But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale. This happens, as it seems, in all cases where no presumption of law, or *prima facie* right, operates in favor of either party; as, for example, where the question between the owners of contiguous estates is, whether a particular tree near the boundary grows on the land of one or the other. But even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law. If a party claimed as devisee against the heir at law, full proof of

the devise with all its formalities, would be essential; circumstantial evidence, which merely showed it to be more probable that the testator had made a will in favor of the party claiming as devisee, than that he had not done so, would be insufficient. So were a devise to be fully established by one who claimed as devisee, it would not be sufficient to show a mere probability that the devisor had made a subsequent will, revoking the former.^k One who seeks to charge another with a debt, must do so by full and satisfactory proof; and on the other hand, where a debt has once been established by competent proof, the debtor cannot discharge himself but by full proof of satisfaction. Again, where the law raises a presumption in favor of the fact, the contrary must be fully proved, or at least such facts must be proved as are sufficient to raise a contrary and stronger presumption.^l Thus the law presumes a man to be innocent of a crime *until his guilt be proved; but if the fact be proved that *A.* killed *B.*, then the presumption of law which [*819 before was in favor of *A.* is now against him, and malice will be presumed, unless he can establish facts which justify or extenuate the act.^m

Another distinction to be observed upon is, between *primâ facie* and conclusive evidence: *primâ facie* evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be accredited by the jury, unless it be rebutted or the contrary proved; *conclusive* evidence, on the other hand, is that which excludes, or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established. All evidence is strong or weak by comparison: in civil cases slight evidence of right or title is sufficient, as against a stranger who possesses no color of title. Thus the mere possession of goods by one who found them, is evidence of property as against a wrong-doer, in an action of trover.ⁿ The occupation of land, however recent, will enable the occupier to maintain trespass against a stranger.^o So in a settlement case, proof that a remote ancestor of the pauper was settled in the appellant parish would be sufficient *primâ facie*

^k *Harwood v. Goodright*, Cowp. 87.

^l See *R. v. Haslingfield*, *supra*, p. 749.

^m See tit. MURDER.

ⁿ *Armory v. Delamirie*, Str. 505; 1 Smith, L. C. and notes; *Bridges v. Hawkes*, 21 L. J., Q. B. 75.

^o *Catteris v. Cowper*, 4 Taunt. 547; *Purnell v. Young*, 3 M. & W. 288; *Whittington v. Boxall*, 5 Q. B. 139; E. C. L. R. 48.

evidence, and would prevail unless it were rebutted by proof of some later settlement. So a special custom in a particular manor may be proved by a single instance in which it has been acted upon.^p So a prescription may in some instances be supported by proof of user for twenty years. On the other hand, in criminal cases, it is essential that the evidence should be of a *conclusive* nature. But here it is to be observed, that it very frequently happens in criminal, as *820] well as civil proceedings, *that evidence which in itself is but inconclusive, derives a conclusive quality from mere defect of proof on the part of the adversary or accused.

Where a party, being apprised of the evidence to be adduced against him, has the means of explanation or refutation in his power, if the charge or claim against him be unfounded, and does not explain or refute that evidence, the strongest presumption arises that the charge is true, or the claim well founded. It would be contrary to all experience of human nature and conduct to come to any other conclusion.

Evidence to be weighed by a jury consists either in, 1st, the direct testimony of witnesses; or 2dly, indirect or circumstantial evidence;^q or 3dly, in both, either united or opposed to each other. The nature and force of such evidence may be considered either separately or in conflict.

First, as to the direct testimony of witnesses. The credit due to the testimony of witnesses depends upon, 1st, their integrity and honesty; 2ndly, their ability; 3dly, their number, and the consistency of their testimony; 4thly, the conformity of their testimony with experience; and 5thly, the coincidence of their testimony with collateral circumstances.

1st, Their *integrity*: A witness, to be trust-worthy, must be both *willing* and *able* to declare the truth. His credibility is founded, in the first instance, upon experience of human veracity, from which the law presumes that a disinterested witness, who delivers his testimony under *the sanction of an oath, and under the peril of *821] the temporal inflictions due to perjury, will speak the truth.

^p See tit. CUSTOM.

^q Such indirect evidence corresponds with the *signa* of the Roman law, and with the *σημεία* or *τεκμήρια* of the Greeks, and supplied principally the materials of the *artificialis probatio* of the Roman lawyers. Argument, according to Quintilian, is defined to be "*ratio probationem præstans quâ colligitur aliud per aliud, et quæ quod est dubium per id quod dubium non est confirmat*;" see Glassford's Essay on the Principles of Evidence, 563.

Although the law does not exclude persons actually convicted of infamous crimes,* and such as have an interest in the event of the suit, or in the record," yet the credit of a witness is always for the consideration of the jury.

A witness of depraved and abandoned character may not be unworthy of credit, where it appears that there is not the slightest motive or inducement for misrepresentation; for there is a natural tendency to declare the truth, which is never wholly eradicated, even from the most vicious minds; and the danger of detection, and the risk of temporal punishment, may operate as restraints upon the most unprincipled, even where motives for veracity of a higher nature are wanting.

But it is to be remarked, that it is difficult to detect the motives which may influence a depraved and corrupted mind; and hence it is for the jury to consider, whether the apparent want of motive to deceive be sufficient to accredit an exceptionable witness, and whether some assurance of the actual absence of such a motive be not necessary to warrant their confidence. A jury may, no doubt, in a criminal case, convict on the testimony of an accomplice, but then it is expected that the tainted credit of the witness should be supported by circumstances confirmatory of his testimony in material points; so that in practice such a witness is considered to be incredible, unless his testimony be supported by undoubted facts and unexceptionable witnesses.

It frequently happens that a witness labors under some influence arising from natural affection, near connection, or mere expectation of contingent benefit or evil, which may afford a strong temptation to perjury. In these as in so many other cases, it is for the jury to estimate the *degree of influence by which the testimony of a witness is likely to be corrupted, and to determine whether, [822 under all the circumstances, he be the witness of truth.†

In arriving at this conclusion, a consideration of the demeanor of the witness upon the trial, and of the manner of giving his evi-

* *Supra*, tit. WITNESS.

† *Ibid*.

‡ The Roman law, *De testibus*, provides thus:—" *Testium fides diligenter examinanda est. Ideoque in personâ eorum exploranda erunt imprimis conditio cujusque; utrum quis decurio an plebeius sit, vero et an honestæ et inculpatae vitæ, an notatus quis et reprehensibilis; an locuples vel egens sit ut lucri causâ quid facile admittat; vel an inimicus ei sit versus quem testimonium fert, vel amicus ei sit pro quo testimonium dat. Nam si careat suspitione testimonium, vel propter personam a quâ fertur quod honesta sit, vel propter causam quod neque lucri neque gratiæ neque inimicitiae causâ fit, admittendum.*"

dence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself." An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question, for the purpose of gaining time^v to *823] consider the effect of *his answer; precipitancy in answering, without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference; are all to a greater or less extent obvious marks of insincerity.

On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity. The means thus afforded by a *vivâ voce* examination, of judging of the credit due to witnesses, especially where their statements conflict, are of incalculable advantage in the investigation of truth; they not

^u Sir W. Blackstone, 3 Com. 373, observes, "In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing and read to the judge in the absence of those who made them, and yet as much may be frequently collected from the manner in which the evidence is delivered as the matter of it."

^v Mr. Evans, 2 Pothier, 258, observes, that "a Welsh witness, who intends to give unfair testimony, always affects an ignorance of the English language; in consequence of which, the effect of cross-examination is not only weakened by the intervention of an interpreter, but the witness has time to collect and prepare his answer. An ignorant witness will, however, frequently express himself with doubt and hesitation, out of mere awkwardness, or from superabundant caution, especially if he imagine that there is any design to entrap him into expressions contrary to his real meaning.

"This kind of hesitation is very general with such persons when plied with questions of an hypothetical nature, and when the answer is not so much an act of testimony as of reasoning; such as, *If it had been so, must you not have recollected, &c.* Where proof is actually given of a fact which a witness could not but know and recollect, his expressing himself with doubt and uncertainty is to be regarded as an act of wilful misrepresentation."

unfrequently supply the only true test by which the real characters of the witnesses can be appreciated.*

2d. Their *ability*: The ability of a witness to speak the truth must of course depend on the opportunities which he has had of observing the fact,^x the accuracy *of his powers of discerning,^y and the faithfulness of his memory in retaining the [*824 facts once observed and known.

Where a witness testifies to a fact which is wholly or partially the result of reason exercised upon particular circumstances, it is obvious that the reasons of the witness for drawing that conclusion are of the most essential importance for the purpose of ascertaining whether his conclusion was a correct one; although it should be borne in mind, that the reasons which a witness gives for his belief are those which occur to him upon his examination, and are frequently different from those which actually produced his belief or opinion.

These observations apply with peculiar force to all questions of skill and science, and even to many of mere ordinary fact: thus, where a witness is called to state that another witness is not to be believed upon his oath, his grounds for arriving at that conclusion are of the highest importance. Where, on the other hand, a witness states the impression on his senses, by any subject-matter of frequent experience, his reasons are of little weight; he will frequently assign a bad reason where his knowledge is certain.

The probability that the witness had originally a clear perception of the fact and its circumstances, is strengthened and confirmed by the consideration that they were of such a nature as were likely to attract his attention. On the other hand, it is diminished by

* *Tu magis scire potes quanta fides habenda sit testibus quæ et cujus dignitatis et quantæ æstimationis sunt et qui simpliciter visi sunt dicere, utrum unum eundemque meditatatum sermonem attulerint, an ad ea quæ interrogaveras ex tempore verisimilia responderint.* Adrian's Epistle to Varus, legate of Cilicia; Ff. 22; 5, 3.

^x When the guilt of the prisoner depends *wholly* on proof of identity, it is impossible to inquire too minutely into the means and opportunity which the witnesses had of observing the person, so as to be able to speak with certainty. Many instances have occurred in which well-intentioned witnesses have sworn positively in this respect, and yet have been mistaken. I have frequently heard Mr. J. Bayley observe to juries, that fear has a very different effect upon different persons; in some it prevents the clear perception, whilst in others it assists in making an indelible impression.

^y See Gilb. Law of Ev. 151, 2nd ed.

*825] the consideration *that the transaction was remote, and such as was not likely to excite notice and observation.²

Such considerations operate strongly where detailed evidence is given of oral declarations, after the lapse of a considerable interval of time. Every man's experience teaches him how fallible and treacherous the human memory in such cases is. In its freedom from this defect consists one great excellence of documentary evidence, and its main superiority over that which is merely oral; and on this principle it is, that the law, out of policy, frequently deems mere oral evidence to be too weak, and requires a written voucher to prove the fact.^a

Of all kinds of evidence, that of extra-judicial and casual declarations is the weakest and most unsatisfactory; such words are often spoken without serious intention, and they are always liable to be mistaken and misremembered, and their meaning is liable to be misrepresented and exaggerated.^b

* C. B. Gilbert, in his *Law of Evidence*, 151, 2nd edit., says, "Another thing that would render his (a single witness's) testimony doubtful, is the not giving the reasons and causes of his knowledge;" and again, "The same may be said as to persons who take upon them to remember things long since transacted, for if the matter be frivolous they ought to tell the causes of their memory, otherwise the memory is little to be accredited; for they are rather to be supposed as rash persons who take upon them to swear what they do not perfectly remember, than that they are really under the awe and conscience of an oath; for there they would be able to tell the reason and certain marks of their remembrance." *Sed quære*.

^a See the Statute of Frauds, &c.

^b Finalmente è quasi nulla la credibilità del testimonio, quando si faccia delle parole un delitto, poichè il tuono, il gesto, tutto ciò che precede, e ciò che siegue, le differenti idee, che gli uomini attaccano alle stesse parole, alterano, e modificano in maniera i detti di un uomo, che è quasi impossibile, il ripeterle, quali precisamente furon dette. Di più le azioni violenti, e fuori dell' uso ordinario, quali sono i veri delitti, lascian traccia di se nella moltitudine delle circostanze, e negli effetti che ne derivano, ma le parole non rimangono che nella memoria per lò più infidele e spesso sedotta dagli ascoltanti. Egli è adunque di gran lunga più facile una alunnia sulle parole, che sulle azioni di un uomo, poichè di queste quanto maggior numero di circostanze si adducono in prova, tanto maggiori mezzi si somministrano al reo per giustificarsi. Beccaria, sec. 13.

I once heard a learned judge (now no more), in summing up on a trial for forgery, inform the jury that the prisoner, in a conversation which he had had with one of the witnesses, had said, "I *am* the drawer, the acceptor, and the indorser of the bill:" whilst the learned judge was commenting on the force of these expressions, he was, at the instance of the prisoner, set right as to the statement of the witness, which was, that the prisoner had said, "I *know* the drawer, acceptor, and the indorser of the bill." Had the witness, and not the judge, made the mistake, the consequences might have been fatal. The prisoner was acquitted.

*A hearer is apt to clothe the ideas of the speaker, as he understands them, in his own language, and by this translation the real meaning must often be lost. A witness, too, who is not entirely indifferent between the parties, will frequently, without being conscious that he does so, give too high a colouring to what has been said. [*826]

The necessity for caution cannot be too strongly and emphatically impressed, where particular expressions are detailed in evidence, which were used at a remote distance of time, or to which the attention of the witnesses was not particularly called, or where misconception was likely to arise from their situation and the circumstances under which they were placed, or from the prejudice of the witness, especially if his object was to extract an admission for the purposes of the cause.^a

Such evidence is fabricated easily, contradicted with difficulty. In cases of this kind, the conduct of the parties, and those facts and circumstances of the case which are free from suspicion, are frequently the safest and surest guides to truth. Evidence of this nature is of the very *weakest kind, where it is doubtful whether the party making the admission knew his legal rights and situation.^d [*827]

3d. *Their number and consistency*: The testimony of a single witness, where there is no ground for suspecting either his ability or his integrity, is a sufficient legal ground for belief; that it is strong enough to produce actual belief, every man's experience will vouch.

It has been alleged^e that two witnesses are essential to convict a man of a crime; for if there be but one, it is no more than the assertion of one man against that of another.

It is not easy to comprehend how the mere denial of guilt by

^a Admitting evidence of loose conversations to revive an antiquated debt, which would otherwise have been barred by lapse of time; (see the observations of the court, 4 B. & A. 571;) or to render a party liable for a debt contracted in infancy, was so considered objectionable, that it led to the statute 9 Geo. IV. c. 14, ss. 1, 5.

^d As where, in a settlement case, the declaration of an inhabitant is given in evidence; or a party makes admissions involving matter of law as well as matter of fact; as in reference to marriage; see tit. MARRIAGE—POLYGAMY. Or a discharge under an Insolvent Act; *Summersett v. Adamson*, 1 Bing. 73; E. C. L. R. 8; but see *Scott v. Clare*, 3 Camp. 236; and *Slatterie v. Pooley*, 6 M. & W. 664.

^e Montesquieu, *Sp. of Laws*, b. 12, c. 3.

an accused person, whose life may depend upon the credit attached to that denial, is to be placed in competition with the testimony of a witness examined upon oath. According to this species of logic, if six men were to commit a crime, it would require the testimony of at least seven witnesses to convict them upon their joint trial.⁴

*828] *But although the testimony of a single witness, whose credit is untainted, be sufficient to warrant a conviction, even in a criminal case, yet undoubtedly any additional and concurrent testimony adds greatly to the credibility of testimony, in all cases where it labours under doubt or suspicion; for then an opportunity is afforded of comparing the testimony of the witnesses on minute and collateral points, on which, if they were the witnesses of truth, their testimony would agree, but if they were false witnesses, would be likely to differ.⁵

Where direct testimony is opposed by conflicting evidence or by ordinary experience, or by the probabilities supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material. It is more improbable that a number of witnesses should be mistaken, or that they should have conspired to commit a fraud by direct perjury, than that one or a few should be mistaken, or wilfully perjured. In the next place, not only must the difficulty of procuring a number of false witnesses be greatly increased in proportion to the number, but the

⁴ The civil law requires proof by two witnesses, according to its universal maxim, "*Unius responsio testis omnino non audietur.*" Sir W. Blackstone observes, 3 Comm. 370, that to extricate itself out of one absurdity, the practice of the civil-law courts plunged itself into another. For as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one *semiplena probatio* only, on which no sentence can be founded: to make up, therefore, the necessary complement of witness, where they had one only to a single fact, they permitted the party himself, plaintiff or defendant, to be examined on his own behalf, and administered to him what is called the suppletory oath; and if his oath happened to be in his own favour, this immediately converted the half proof into a whole one. Now, however, the party is a perfectly competent witness in all courts, though the weight which should attach to his testimony must be for the court or jury to weigh. It might perhaps be well, if, as a general rule, where other evidence is procurable, the evidence of the party was merely regarded as suppletory. The instances of perjury and treason are exceptions to the rule of the common law requiring only one witness: the former, upon grounds of strict principle, for there the oath of one witness is opposed to the oath of another witness; and, in the latter, as a mere rule of policy devised for protecting the liberty of the subject.

⁵ *Quia a cordato iudice mendacia testium deprehendi possunt, si diversi interrogantur cum contra unus facile sibi constare possit*; Puffendorf, 568.

danger and risk of detection must be increased in a far higher proportion; for the points on which their false statements may be compared with each other, and with ascertained facts, must necessarily be greatly multiplied.

*The *consistency* of testimony is also a strong and most important test for judging of the credibility of witnesses. [*829 Where several witnesses bear testimony to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions; either the testimony is true, or the coincidences are the result of concert and conspiracy. If, therefore, the independency of the witnesses be proved, and the supposition of previous conspiracy be disproved or rendered highly improbable, to the same extent will the truth of their testimony be established.^a

So far does this principle extend, that in many cases, except for the purpose of repelling the suspicion of fraud and concert, the credit of the witnesses themselves for honesty and veracity may become wholly immaterial. Where it is once established that the witnesses to a transaction are not acting in concert, then, although individually they should be unworthy of credit, yet if the coincidences in their testimony be too numerous to be attributed to mere accident, they cannot possibly be explained on any other supposition than that of the truth of their statement.

The considerations which tend to negative any suspicion of concert and collusion between the witnesses, are either extrinsic of their testimony; such, for instance, as relate to their character, situation, their remoteness from each other, the absence of previous intercourse with each other or with the parties, and of all interest in the subject-matter of litigation; or they arise internally, from a minute and critical examination and comparison of the testimony itself.

*The *nature* of such coincidences is most important: are they natural ones, which bear not the marks of artifice and premeditation? Do they occur in points obviously material, or in minute and remote points which were not likely to be material, [*830

^a See Lord Mansfield's remarks in *R. v. Genge*, Cowp. 16. "It is objected that these books are of no authority; but if both the reporters were the worst that ever reported, if substantially they report a case in the same way, it is demonstrative of the truth of what they report, or they could not agree."

or in matters the importance of which could not have been foreseen? The number of such coincidences is also worthy of the most attentive consideration: human cunning, to a certain extent, may fabricate coincidences, even with regard to minute points, the more effectually to deceive; but the coincidences of art and invention are necessarily circumscribed and limited, whilst those of truth are indefinite and unlimited: the witnesses of art will be copious in their detail of circumstances, as far as their provision extends; beyond this they will be sparing and reserved, for fear of detection, and thus their testimony will not be even and consistent throughout: but the witnesses of truth will be equally ready and equally copious upon all points.

It is here to be observed, that partial variances in the testimony of different witnesses, on minute and collateral points, although they frequently afford the adverse advocate a topic for copious observation, are of little importance, unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention, or defect of memory.

*831] It has been well remarked by a great observer,¹ that
 * "the usual character of human testimony is substantial

¹ "I know not (says Dr. Paley) a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud. When written histories touch upon the same scenes of action, the comparison almost always affords ground for a like reflection. Numerous and sometimes important variations present themselves; not seldom, also, absolute and final contradictions; yet neither the one nor the other are deemed sufficient to shake the credibility of the main fact. The embassy of the Jews to deprecate the execution of Claudius's order to place his statue in their temple, Philo places in harvest, Josephus in seed-time; both contemporary writers. No reader is led by their inconsistency to doubt whether such an embassy was sent, or whether such an order was given. Our own history supplies examples of the same kind: in the account of the Marquis of Argyle's death, in the reign of Charles the Second, we have a very remarkable contradiction. Lord Clarendon relates that he was condemned to be hanged, which was performed the same day; on the contrary, Burnet, Woodrow, Heath, and Echard concur in stating that he was beheaded; and that he was condemned upon the Saturday, and executed upon the Monday.

truth under circumstantial variety." It so rarely happens that witnesses of the same transaction perfectly and entirely agree in all points connected with it, that an entire and complete coincidence in every particular, so far from strengthening their credit, not unfrequently engenders a suspicion of practice and concert.

The real question must always be, whether the points of variance and of discrepancy be of so strong and decisive *a [*832 nature as to render it impossible, or at least difficult, to attribute them to the ordinary sources of such varieties, inattention or want of memory.

It would, theoretically speaking, be improper to omit to observe that the weight and force of the united testimony of numbers, upon abstract mathematical principles, increases in a higher ratio than that of the mere numbers of such witnesses.

Upon those principles, if definite degrees of probability could be assigned to the testimony of each witness, the resulting probability in favor of their united testimony would be obtained, not by the mere addition of the numbers expressing the several probabilities, but by a process of multiplication.

Such considerations, however, are of little practical importance. The maxim of law is *ponderantur testes, non numerantur*. No definite degrees of probability can in practice be assigned to the testimonies of witnesses; their credibility usually depends upon the special circumstances attending each particular case, upon their connection with the parties and the subject-matter of litigation, their previous characters, the manner of delivering their evidence, and many other circumstances, by a careful consideration of which the value of their testimony is usually so well ascertained as to leave no room for mere numerical comparison.

Was any reader of English history ever sceptic enough to raise a doubt whether he was executed or not?"

It may not perhaps be deemed irrelevant to mention a circuit anecdote in illustration of the foregoing observations. Not long before the death of Mr. Justice Le Blanc, and whilst he was presiding as one of the judges of assize at Lancaster, he had a fainting fit. Some time afterwards, the circumstance being the topic of conversation amongst a considerable number of the members of the bar who had been present, a doubt was started, whether the fact had taken place in the ordinary Civil Court or in the Crown Court, in which civil causes were usually tried after the termination of the business on the Crown side; and those who had been actual spectators were divided as to their recollection in which of the two courts the circumstance had occurred, many asserting that it took place in the one court, and nearly as many that it occurred in the other court.

In some instances, nevertheless, where from paucity of circumstances, the usual means of judging of the credit due to conflicting witnesses fail, it is possible that the abstract principles adverted to may operate by way of approximation, especially in those cases where the decision is to depend upon the mere preponderance of evidence.

4th, The *conformity* of their testimony with experience: As one principal ground of faith in human testimony is experience, it necessarily follows that such testimony is strengthened or weakened by its conformity or inconsistency with our previous knowledge and experience. A *man easily credits a witness *833] who states that to have happened which he himself has known to happen under similar circumstances; he may still believe, although he should not have had actual experience of similar facts; but where, as in the familiar instance stated by Mr. Locke,^j that is asserted which is not only unsupported by common experience, but contrary to it, belief is slow and difficult.

In ordinary cases, if a witness were to state that which was inconsistent with the known course of nature, or even with the operation of the common principles by which the conduct of mankind is usually governed, he would probably be disbelieved; for it might be more probable in the particular instance that the witness was mistaken, or meant to deceive, than that such an anomaly had really occurred. But although the improbability of testimony, with reference to experience, affords a just and rational ground for doubt, the very illustration cited by Locke shows that mere improbability is by no means a certain test for trying the credibility of testimony, without regard to the number, consistency, character, independence, and situation of the witnesses, and the collateral circumstances which tend to confirm their statement.^k

^j Vol. II. p. 276. "The Dutch ambassador told the king of Siam that in his country the water was so hard in cold weather, that it would bear an elephant if he were there. The king replied, Hitherto I have believed the strange things you told me, because I looked upon you as a sober fair man, but now I am sure you lie."

^k In observing upon the general principles on which the credibility of human testimony rests, it may not be irrelevant to advert to the summary positions on this subject advanced by Mr. Hume. He says, in his *Essay*, vol. 2, sec. 10, "A miracle is a violation of the laws of nature; and as a firm and unalterable experience has established these laws, the proof against a miracle, from the very nature of the fact, is as entire as any argument from experience can possibly be imagined." As a matter of abstract philosophical consideration (for in that

In ordinary *cases where a witness stands wholly unimpeached by any extrinsic circumstances, credit ought to be given to his *testimony, unless it be so grossly improbable as to satisfy the jury that he is not to be trusted. Thus, [*834 [*835

point of view only can the subject be adverted to in a work like this), Mr. Hume's reasoning appears to be altogether untenable. In the first place, the very basis of his inference is that faith in human testimony is founded solely upon *experience*: this is by no means the fact; the credibility of testimony frequently depends upon the exercise of reason, on the effect of *coincidences in testimony*, which, if collusion be excluded, cannot be accounted for but upon the supposition that the testimony of concurring witnesses is true; so much so, that their individual character for veracity is frequently but of secondary importance, *supra*, p. 829. Its credibility also greatly depends upon, confirmation by collateral circumstances, and on analogies supplied by the aid of reason as well as of mere experience. But even admitting experience to be the basis, the sole basis, of such belief, the position built upon it is unwarrantable, and it is fallacious, for if adopted it would lead to error. The position is, that human testimony, the force of which rests upon experience, is inadequate to prove a violation of the laws of nature, which are established by firm and unalterable experience. The very essence of the argument is, that the force of human testimony (the efficacy of which in the abstract is admitted) is *destroyed* by an opposite, conflicting, and superior force, derived also from experience. If this were so, the argument would be invincible; but the question is, whether mere previous *inexperience* of an event testified is directly opposed to human testimony, so that mere experience as strongly proves that the thing *is not* as previous experience of the credibility of human testimony proves that it *is*. Now a miracle, or violation of the laws of nature, can mean nothing more than an event or effect never observed before, and to the production of which the known laws of nature are inadequate; and on the other hand, an event or effect in nature never observed before is a violation of the laws of nature: Thus, to take Mr. Hume's own example, "it is a miracle that a dead man should come to life, because that *has never been observed* in any age or country;" precisely in the same sense, the production of a new metal from potash, by means of a powerful and newly discovered agent in nature, and the first observed descent of meteoric stones were violations of the laws of nature; they were events which had never before been observed, and to the production of which the known laws of nature were inadequate. But none of these events can, with the least propriety, be said to be *against* or *contrary* to the laws of nature, in any other sense than that they have never before been observed, and that the laws of nature, as far as they were previously known, were inadequate to their production. The proposition of Mr. Hume ought then to be stated thus: human testimony is founded on experience, and is therefore inadequate to prove that of which there has been no previous experience. Now whether it be plain and self-evident that the mere negation of experience of a particular fact necessarily destroys all faith in the testimony of those who assert the fact to be true; or whether, on the other hand, this be not to confound the *principle* of belief with the *subject-matter* to which it is to be applied, and whether it be not plainly contrary to reason to infer the *destruction*

836] notwithstanding the general presumption of law in favour of innocence, a defendant may be convicted of a heinous and even improbable crime upon the testimony of a single witness.

of an active principle of belief from the mere *negation of experience*, which is perfectly consistent with the just operation of that principle; whether, in short, this be not to assume broadly that mere inexperience on the one hand is necessarily superior to positive experience on the other, must be left to every man's understanding to decide. The inferiority of mere negative evidence to that which is direct and positive, is, it will be seen, a consideration daily acted upon in judicial investigations. Negative evidence is, in the abstract, inferior to positive, because the negative is not directly opposed to the positive testimony; both may be true. Must not this consideration also operate where there is mere inexperience, on the one hand, of an event in nature, and positive testimony of the fact on the other? Again, what are the laws of nature, established by firm and unalterable experience? That there may be, and are, general and even *unalterable* laws of Providence and nature, may readily be admitted; but that *human knowledge and experience* of those laws is unalterable (which alone can be the test of exclusion) is untrue, except in a very limited sense; that is, it may fairly be assumed that a law of nature once known to operate will always operate in a similar manner, unless its operation be impeded or counteracted by a new and contrary cause. In a larger sense, the laws of nature are continually alterable: as experiments are more frequent, more perfect, and as new phenomena are observed, and new causes or agents are discovered, human experience of the laws of nature becomes more general and more perfect. How much more extended and perfect, for instance, are the laws which regulate chemical attractions and affinities than they were two centuries ago! And it is probable that in future ages experience of the laws of nature will be more perfect than it is at present; it is, in short, impossible to define to what extent such knowledge may be carried, or whether, ultimately, the whole may not be resolvable into principles admitting of no other explanation than that they result immediately from the will of a superior Being. This at all events is certain, that the laws of nature, as inferred by the aid of experience, have from time to time, by the aid of experience, been rendered more general and more perfect. Experience, then, so far from pointing out any unalterable laws of nature, to the exclusion of events or phenomena which have never before been experienced, and which cannot be accounted for by the laws already observed, shows the very contrary, and proves that such new events or phenomena may become the foundation of more enlarged, more general, and therefore more perfect laws. But whose experience is to be the test? That of the objector; for the very nature of the objection excludes all light from the experience of the rest of mankind. The credibility, then, of human testimony is to depend not on any intrinsic or collateral considerations which can give credit to testimony, but upon the casual and previous knowledge of the person to whom the testimony is offered; in other words, it is plain that a man's scepticism must bear a direct proportion to his ignorance. Again, if Mr. Hume's inference be just, the consequences to which it leads cannot be erroneous; on the other hand, if it lead to error, the inference must be fallacious. The position is, that human testimony is inadequate to prove that which has never been observed before: and

*As experience shows that events frequently occur which would antecedently have been considered most improbable, [*837 from their inconsistency with ordinary experience, and as [*838 *their improbability usually arises from want of a more intimate and correct knowledge of the causes which produced

this, by proving far too much for the author's purpose, is *felo de se*, and in effect proves nothing; for if constant inexperience amount to stronger evidence on the one side than is supplied by positive testimony on the other, the argument applies necessarily to all cases where mere constant inexperience on the one hand is opposed to positive testimony on the other. According, then, to this argument, every philosopher was bound to reject the testimony of witnesses that they had seen the descent of meteoric stones, and even acted contrary to sound reason in attempting to account for a fact disproved by constant inexperience, and would have been equally foolish in giving credit to a chemist that he had produced a metal from potash by means of a galvanic battery. It will not, I apprehend, be doubted, that in these and similar instances the effect of Mr. Hume's argument would have been to exclude testimony which was true, and to induce false conclusions; the principle, therefore, on which it is founded, must of necessity be fallacious. Nay, further, if the testimony of others is to be rejected, however unlikely they were either to deceive or be deceived, on the mere ground of inexperience of the fact testified, the same argument might be urged even to the extravagant length of excluding the authority of man's own senses; for it might be said, that it is more probable that he should have laboured under some mental delusion, than that a fact should have happened contrary to constant experience of the course of nature.

In stating that the inference attempted to be drawn from mere inexperience is fallacious, I mean not to assert that the absence of previous experience of a particular fact or phenomena is not of the highest importance to be weighed as a circumstance in all investigations, whether they be physical, judicial, or historical: the more remote the subject of testimony is from our own knowledge and experience, the stronger ought the evidence to be to warrant our assent. Neither is it meant to deny that, in particular instances, and under particular circumstances, the want or absence of previous experience may not be too strong for positive testimony, especially where it otherwise labours under suspicion. What is meant is this, that mere inexperience, however constant, is not in itself, and in the abstract, and without consideration of all the internal and external probabilities in favour of human testimony, sufficient to defeat and to destroy it, so as to supersede the necessity of investigation. Mr. Hume's conclusion is highly objectionable in a philosophical point of view, inasmuch as it would leave phenomena of the most remarkable nature wholly unexplained, and would operate to the utter exclusion of all inquiry. Estoppels are odious, even in judicial investigations, because they tend to exclude the truth; in metaphysics they are intolerable. So conscious was Mr. Hume himself of the weakness of his general and sweeping position, that in the second part of his 10th section he limits his inference in these remarkable terms: "I beg the limitations here made may be remarked, when I say that a miracle can never be proved so as to be the foundation of a system of religion; for I own that otherwise there *may possibly* be miracles or

them, mere improbability can rarely supply a sufficient ground for disbelieving direct and unexceptionable witnesses of the fact, where there was no room for mistake.

5th, *Conformity* with collateral circumstances: Direct testimony is not only capable of being strengthened or weakened to an indefinite extent by its conformity on the one hand, or inconsistency on the other, with circumstances collateral to the disputed fact, but may be totally rebutted by means of such evidence. A claimant, after his case was referred to by the House of Lords and evidence taken on it, presented an additional case, alleging an inscription on a tombstone in a churchyard in Ireland, which if proved would sustain the claim. It could not be produced. Several witnesses from the neighborhood swore that they saw the tombstone and inscription about twenty years ago. There was no discrepancy in their statements, and no witnesses called to contradict them. The House held, that the evidence of the existence of the tombstone and of the inscription was not sufficient; and that the neglect of the claimant to produce the evidence earlier raised suspicions, which would only be removed by producing the stone, or calling witnesses of greater credit from the neighborhood.¹ These positions lead immediately to an inquiry into the nature and force of indirect or circumstantial evidence.

Secondly, Indirect or circumstantial evidence, or, as it is frequently termed, presumptive evidence. Any evidence which is not direct and positive^m is of this class.

*839] *An inference or conclusion from circumstantial or presumptive evidence, may be either the pure result of pre-

violations of the usual course of nature of such a kind as *to admit of proof from human testimony.*"

In what way the use to be made of a fact when proved can affect the validity of the proof, or how it can be that a fact *proved* to be true is not true for all purposes to which it is relevant, I pretend not to understand. Whether a miracle, when proved, may be the foundation of a system of religion is foreign to the present discussion; but when it is once admitted that a miracle *may be proved by human testimony*, it necessarily follows, from Mr. Hume's own concession, that his general position is untenable; for that, if true, goes to the full extent of proving that human testimony is *inadequate* to the proof of a miracle, or violation of the laws of nature.

¹ *Tracy Peerage case*, 10 Cl. & F. 154.

^m For a more copious statement of the principles on which the force of circumstantial evidence depends, illustrated by numerous cases, the reader is referred to a very interesting book, entitled "*An Essay on the Rationale of Circumstantial Evidence*," by Mr. Wills, and to Mr. Best's able book on "*Presumptions*."

vious experience of the ordinary or necessary connection between the known or admitted facts and the fact inferred; or of reason exercised upon the facts; or of both reason and experience conjointly. And hence such an inference or conclusion differs from a presumption, although the latter term has sometimes, yet not with strict propriety, been used in the same extended sense; for a presumption in strictness is an inference as to the existence of one fact, from a knowledge of the existence of some other fact, made solely by virtue of previous experience of the ordinary connection between the known and inferred facts, and independently of any process of reason in the particular instance.^a

The consideration of the nature of circumstantial evidence, and of the principles on which it is founded, merits the most profound attention. It is essential to the well-being at least, if not to the very existence of civil society, that it should be understood, that the secrecy with which crimes are committed will not insure impunity to the offender. At the same time it is to be emphatically remarked, that in no case, and upon no principle, can the policy of preventing crimes, and protecting society, warrant any inference which is not founded on the most full and certain conviction of the truth of the fact, independently of the nature of the offence, and of all extrinsic considerations whatsoever. Circumstantial evidence is allowed to prevail to the conviction of an offender, not because it is necessary and politic that it should be resorted to,^o but *because it is in its own nature capable of producing the [*840

^a See *supra* PRESUMPTIONS.

^o It is almost superfluous to remark upon the absurd and mischievous doctrine, that the nature of the crime ought at all to influence the measure of proof, and that, out of policy, slighter proof is sufficient in proportion to the atrocity of the offence, according to the pernicious maxim, *in atrocissimis leviores conjecturæ sufficiunt et licet judici jura transgredi*. Where any doubt exists as to the *corpus delicti*, whether any crime has been committed, the very reverse of the above position is true; the more atrocious the nature of a crime is, the more repugnant it is to the common feelings of human nature, the more improbable it is that it has been perpetrated at all. “La credibilità di un testimonio diviene tanto sensibilmente minore quanto più cresce l'atrocità di un delitto e l'inverisimiglianza delle circostanze; tali sono per esempio la magia, e la azioni gratuitamente crudeli;” Beccaria, s. 13. But when it has once been clearly established that a heinous crime has been perpetrated, and the only question is as to the perpetrator, it is manifest that the atrocity of the crime *in the abstract* raises no probability either for or against the accused, although under particular circumstances it may be a matter of great importance.

Thus on a charge of infanticide, where there is a doubt whether the child was

highest degree of moral certainty in its application. Fortunately for the interests of society, crimes, especially those of great enormity and violence, can rarely be committed without affording vestiges by which the offender may be traced and ascertained.^p The very measures which he adopts for his security not unfrequently turn out to be the most cogent arguments of guilt. On the other hand, it is to be recollected that this is a species of evidence which requires the utmost degree of caution and vigilance in its application, and in acting upon it, the just and humane rule impressed by Lord Hale^a cannot be too often repeated: "*tutius* *841] *semper est errare in acquietando, quam in puniendo, ex parte misericordiæ quam ex parte justitiæ?*"

By circumstantial or presumptive proof is meant that measure and degree of circumstantial evidence which is sufficient to produce conviction in the minds of the jury of the truth of the fact in question.

To the validity of every such proof it is essential, first, that a basis of facts be established by sufficient evidence; and in the next place, that the proper conclusion should be deduced, by the aid of reason and experience, from those facts and circumstances so established.

The force and tendency of circumstantial evidence to produce conviction and belief depend upon a consideration of the coincidence of circumstances with the fact to be inferred; that is, with the hypothesis, and the adequacy of such coincidences to exclude every other hypothesis.^r

destroyed by design, or by accident during a secret delivery, the very atrocity of the offence raises a strong degree of probability in favour of the latter conclusion. On the other hand, were it clear from the circumstances under which a body was found, that the party had been murdered, then the *corpus delicti* being established, the atrocity of the offence would in the abstract raise no probability either in favour of or against any individual; but if in the particular instance the question were, whether the son of the deceased, or a stranger, was the guilty agent, then a probability from the particular circumstances would operate in favour of the son. It would, without reference to circumstances, be more probable that a stranger had committed the heinous crime of murder, than that a son had committed that horrible offence upon the person of his own father.

^p See the observations of Beccaria, *supra*, p. 825.

^a Hale, 290.

^r In one respect, proof by circumstantial evidence is analogous to the indirect proof, or *reductio ad absurdum*, in geometry: in each case the truth of the proposition is attained to by negating and excluding the truth of any other hypothesis; in the one case to a metaphysical and absolute, in the other to a

All human dealings and transactions are a vast context of circumstances, interwoven and connected with each other, and also with the natural world, by innumerable mutual links and ties. No one fact or circumstance ever happens which does not owe its birth to a multitude of others, which is not connected on every side by kindred facts, and which does not tend to the generation of a host of dependent ones, which necessarily coincide and agree in their minutest bearings and relations, in perfect harmony [*842 *and concord, without the slightest discrepancy or disorder.

It is obvious that all facts and circumstances which have really happened were perfectly consistent with each other, for they did actually so consist. It is therefore a necessary consequence, that if a number of the circumstances which attended a disputed fact be known and ascertained, and those so coincide and agree with the hypothesis that the disputed fact is true, that no other hypothesis can consist with those circumstances, the truth of that hypothesis is necessarily established.

And again, where the known and ascertained facts so coincide and agree with the hypothesis that the disputed fact is true, as to render the truth of any other hypothesis, on the principles of reason and experience, exceedingly remote and improbable, and morally, though not absolutely and metaphysically, impossible, the hypothesis is established as morally true. It also follows, that if any of the established circumstances be absolutely inconsistent with the existence of the supposed fact, the hypothesis cannot be true, notwithstanding the degree and extent of coincidence in other respects; for if that fact really existed, it was necessarily consistent with all the circumstances.

Thus, in the first place, it sometimes happens that the coincidence between the known facts and the hypothesis is such as absolutely and demonstratively to exclude any other. If, for instance, it were to be proved, that *A. B.* entered a room containing a watch, and that the watch was gone upon his departure, and it were also proved that no agent but *A. B.* in the interval had had access to the room, the proof that *A. B.* took the watch would be

moral certainty. In another and essential point they usually differ: in the geometrical proof the exclusion of *one* other hypothesis frequently excludes *all* others, and thus at once establishes the truth of the proposition; in the case of moral, circumstantial proofs it may not only be necessary to exclude several different hypotheses by as many different processes of reasoning, but a doubt may still exist whether some other hypothesis may not remain unanswered.

conclusive and complete; for the supposition that it had been removed by any other agent would be entirely excluded.

In the next place, the nature and degree of coincidence between *843] the circumstances and the hypothesis may oftentimes* be sufficient to exclude all reasonable doubt, and thus generate full moral conviction and belief, although it be not, as in the former case, of an absolute and demonstrative nature. The probability of an hypothesis must always be proportioned to the *nature, extent, and number* of its coincidences with the circumstances proved.^a

^a All theories which explain the connection between natural phenomena and their causes are of this description. They consist in showing the existence and operation of a cause, and its adequacy to explain the phenomena; in other words, their coincidence with the hypothesis. Evidence, therefore, of the truth of any such theory is in no case demonstrative, although it reach to the highest degree of moral certainty. The most splendid, important, and beautiful of all philosophical theories, that of Sir Isaac Newton, for explaining the solar system, as exhibited by that great philosopher, amounts simply to this: a cause, viz.: gravitation, exists. It is matter of demonstrative proof, that if such a cause did really operate upon the system, it would produce all the effects or phenomena which are actually observed; that is, the supposed cause is sufficient to explain all the phenomena. Hence it is inferred to be true, and the force of this inference is in proportion to the improbability that all the minute coincidences between the phenomena and the hypothesis should be merely fortuitous, and that they should have resulted, not from a cause known to exist, and which is adequate to produce them, but from some other cause unobserved and unknown. To a certain extent, philosophical proofs, as to the relations of cause and effect in the natural world, are similar to circumstantial judicial proofs; in each case the basis of proof consists in the coincidences proved to exist between the phenomena or circumstances and the hypothesis. Beyond this point, and with respect to the effect of such coincidences, they frequently differ essentially. The philosophical proof rests on mere coincidences, indefinite in point of number, and the absence of any other cause adequate to account for the phenomena; but the agency of some other, but unknown, cause can never be absolutely excluded. On the other hand, although circumstantial proof must rest on a limited number of coincidences, yet their nature and force are frequently such as wholly to exclude the truth of any other hypothesis.

Lord Coke, as an instance of presumptive judicial proof, supposes the case where a man is found dead in a house, having been stabbed with a sword, and another is seen coming out of the house with a bloody sword in his hand, no other person having been in the house. Here the circumstances, and consequently the coincidences, are few, but they are of such a nature as wholly and necessarily to exclude any but one hypothesis. So, in the ordinary case of larceny, where stolen goods, recently after the commission of the felony, are found in the possession of the prisoner, who gives no account for the purpose of explaining that possession; although the coincidences between the hypothesis that he was the thief, and the

*Connections and coincidences between circumstances and the hypothesis which they tend to prove, are either those of a natural or mechanical nature, which are the objects of sense, or they are of a moral nature. Those of the first class may consist generally in proximity in point of time and space, and all other circumstances which show that the supposed agent had the means and opportunity of doing the particular act, and connect him with it. As common instances, the possession of stolen goods, in case of robbery, and stains of blood upon the person, the possession of deadly weapons recently used, marks of conflict and violence, in case of homicide, may be cited. Happy it is for the interests of society that forcible injuries can seldom be perpetrated without leaving many and plain vestiges by which the guilty agent may be traced and detected. Instances of this nature, where apparently slight and unexpected circumstances have led to the detection of offenders, are familiar to all who are concerned in the practical administration of justice. In a case of burglary the thief had gained admittance to the house by opening a window by means of a pen-knife, which was broken in the attempt, and part was left in the wooden frame: the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment left. A murder had been committed by shooting the deceased with a pistol, and the prisoner was connected with the transaction by proof that the wadding of the pistol was part of a *letter belonging to the prisoner, the remainder of which was found upon his person.^t In another case of murder, one of the circumstances to prove the prisoner to have been the criminal agent, was the correspondence of a patch on one knee of his breeches with impressions made upon the soil close to the place where the murdered body lay. In a case of robbery, it appeared that the prosecutor, when attacked, had, in his own defence, struck the robber with a key upon the face, and the prisoner bore an impression upon his face which corresponded with the wards of the key. All circumstances of this nature are, as it were, mechanical links or ties which connect the supposed agent with the act which is the subject of inquiry. Further obser-

circumstances, be but two in number, viz.: his *possession* of the property, and his *omission* to account for that possession, yet the latter is of an exclusive nature and tendency; it forcibly tends to *exclude* any supposition of an honest possession.

^t This case was cited by the Lord Chancellor, in the course of a debate in the House of Lords, 1820.

vations on this branch of the subject would be superfluous, and inconsistent with the object of the present work. There are, in fact, no existing relations, natural or artificial, no occurrences or incidents in the course of nature, or dealings of society, which may not constitute the materials of proof, and become important links in the chain of evidence.

Circumstances of the above description, although they may be in themselves of an imperfect and inconclusive nature, frequently derive a conclusive tendency from those which are of a moral kind, and which depend upon a knowledge and experience of man as a rational and moral agent. Experience points out some laws of human conduct almost as general and constant in their operation as the mechanical laws of the material world themselves are. That a man will consult his own preservation, and serve his own interests; that he will prefer pleasure to pain, and gain to loss; that he will not commit a crime or any other act manifestly tending to endanger his person or property, without a motive; and conversely, that if he has done such an act he had a motive for doing it; are principles *846] of *action and of conduct so clear that they may be properly regarded as axioms in the theory of evidence.

The presumption that a man will do that which tends to his obvious advantage, if he possess the means, supplies a most important test for judging of the comparative weight of evidence. It is to be weighed according to the proof which it was in the power of one party to have produced, and in the power of the other to have contradicted."

If, on the supposition that a charge or claim is unfounded, the party against whom it is made has evidence within his reach by which he may repel that which is offered to his prejudice, his omission to do so supplies a strong presumption that the charge or claim is well founded; it would be contrary to every principle of reason, and to all experience of human conduct, to form any other conclusion. This consideration in criminal cases frequently gives a conclusive character to circumstances which would otherwise be of an imperfect and inconclusive nature." Thus, where the evidence against a prisoner on a charge of larceny consists in his recent possession of stolen property, his very silence as to the fact of possession raises a strong presumption against him; for if his possession was an inno-

" See Lord Mansfield's observations in *Blatch v. Archer*, Cowp. 65.

† Notisi che le prove imperfette delle quale puo il reo giustificarsi è non lo faccia dovere divengono perfette; Beccaria, s. 14.

cent one, as the fact must necessarily be within his knowledge, he might show by statement at all events, if not by proof, that such possession was consistent with his innocence. The same observations apply in general where appearances are proved against an accused person, which he refuses to account for or explain; such as marks of blood and violence on his dress and person, the possession of concealed weapons, and the like.

The same principle applies where a party, having more certain and satisfactory evidence in his power, relies upon *that which is of a weaker and inferior nature. So pregnant with suspicion is conduct of this nature, that the law, as has been seen, has laid down an express and peremptory rule upon the subject, which in cases within the scope of its operation actually excludes the inferior evidence. It is for the jury, in their discretion, to apply the principle, in cases which do not fall within the defined limits of the rule. Although a party may not be always compellable to produce evidence against himself, yet if it be proved that he is in possession of a deed or other evidence, which, if produced, would decide a disputed point, his omission to produce it would warrant a strong presumption to his disadvantage." [847]

Again, the maxim of law is, *omnia præsumuntur contra spoliato-rem*.^x In the case of *Harwood v. Goodright*,^y it was found by a special verdict that the testator made his will, and gave the premises in question to the plaintiff in error, but afterwards made another will different from the former, but in what particulars did not appear; the court decided that the devisee under the first will was entitled against the heir at law. But Lord Mansfield said, that in case the defendant had been proved to have *destroyed* the last will, it would have been good ground for the jury to find a revocation. And as the destruction or withholding of evidence creates a presumption against the party who has had recourse to such a practice, so *à fortiori* does the actual fabrication or corruption of evidence.^z

^w See Lord Mansfield's observations in *Roe dem. Haldane v. Harvey*, Burr. 2484.

^x Ibid.

^y Cowp. 87.

^z See the judicious remarks of Mr. Evans (2 Pothier, by Evans, 337). He justly observes, that one of the most difficult points in the *Douglas cause* arose from Sir John Stewart's having fabricated several letters as received from La Marre, the surgeon; and cites the following passage from Mr. Stuart's observations on the subject:—

"I had been accustomed to think, that in judging upon evidence, a matter of

*848] *The discovery of such practices must naturally and unavoidably excite a considerable degree of jealousy and suspicion, and ought undoubtedly to be most seriously weighed in estimating the degree of credit to be attached to other evidence adduced by the same party, where it is in its own nature doubtful and suspicious, or is rendered so by conflicting evidence. A considerable degree of caution is nevertheless to be applied in cases of this description, more especially in criminal proceedings; for experience shows that a weak but innocent man will sometimes, when appearances are against him, have recourse to falsehood *and deception, for the purpose of manifesting his innocence^a and insuring his safety.

The connection between a man's conduct and his motives is also one of a moral nature, pointed out by experience. It is from their experience of such connections that juries are enabled to infer a man's motives from his acts, and also to infer what his conduct was, from the motives by which he was known to be influenced.

such infinite importance in the constitution and jurisprudence of every well-regulated state, there were certain rules established, which in every court, and in every country, were received as most invaluable guides for the discovery of truth. For instance, when it appeared that on the one side there was *forgery* and *fraud* in some of the material parts of the evidence, and especially when that forgery could be traced up to its source, and discovered to be the contrivance of the very person whose guilt or innocence was the object of inquiry; in such a case I have always understood it to be an established rule, that the whole of the evidence on that side of the question must be deeply affected by a deliberate falsehood of this nature.

"The natural and necessary effect of such a practice upon the minds of judges possessed of discernment and candour, is to make them extremely suspicious of all the evidence tending to the same conclusion with the forged evidence. Parol testimony in support of it will be little regarded: the forgery of the written evidence contaminates the testimony of the witnesses in favour of the party who has made use of that forgery; and nothing will gain credit on that side, but either clear and conclusive written evidence, free from suspicion, or the testimony of such a number of respectable, disinterested, and consistent witnesses, speaking to decisive and circumstantial facts as leaves no room to doubt of the certainty of their knowledge, and the truth of their assertions.

"On the other hand, the proof of a forgery, such as has been described, must also have the effect to gain a more ready admission to the evidence of the other party. If that evidence be consistent, if it be established by the concurring testimony of a crowd of witnesses, and supported by various articles of written and unsuspected evidence, the bias of a fair mind will be totally in favour of the party producing such authorities, and against that which had been obliged to have recourse to the forged evidence."

^a *Supra*, p. 59.

In criminal cases, proof that the party accused was influenced by a strong motive of interest to commit the offence proved to have been committed, although exceedingly weak and inconclusive in itself, and although it be a circumstance which ought never to operate in proof of the *corpus delicti*, yet when that has once been established *aliunde*, it is a circumstance to be considered in conjunction with others which plainly tend to implicate the accused.^b

Again, presumptions of great importances, especially in criminal proceedings, arise frequently out of the connection between the acts of a party, and his intentions, consciousness, and knowledge. That a rational agent must be taken to contemplate and intend the natural and immediate consequences of his own act, is a presumption so cogent as to constitute rather a rule of law than of mere evidence.^c Again, the usual connection between the conduct of a criminal agent and the supposition of his guilt, are of too obvious a nature to be dwelt upon. The seeking for opportunities fit for the occasion; the providing* of poison, or instruments of violence, in a secret and clandestine manner; the subsequent concealment of them; attempts to divert the course of inquiry,^d or prevent investigation as to the cause of death, not unfrequently excites just cause of suspicion: above all, the restless anxiety of a mind conscious of guilt very frequently prompts the party to take measures for his security which eventually supply the strongest evidence of his criminality. [*850

In judicial investigations, as well as in the ordinary course of life, that is more or less probable and likely, and is therefore, in a greater or less degree, an inducement to belief, which more or less

^b On the other hand, the total absence of any apparent motive must always operate strongly as a circumstance in favour of the accused, especially where there is no reason to apprehend any unsoundness of intellect. *A fortiori*, does the principle operate where the supposed agent was actuated by contrary motives. And even in cases which involve a conflict of motives, such as infanticide, where natural feelings on the one hand are opposed to a desire of avoiding shame and detection on the other, the former are necessarily entitled to the highest consideration.

^c See tit. INTENTION—MALICE.

^d I have remarked that persons of the lowest classes of society, before the commission of premeditated murder, not unfrequently throw out some dark and mysterious hints as to the death of the intended victim. This is a circumstance which I apprehend is to be attributed principally to an expectation that by this means less of surprise and of inquiry will take place when the crime has been accomplished.

agrees with former observation. This is a ground of assent, warranted as well by philosophy as by ordinary experience. It is probable that whatever has happened will again happen under similar circumstances, however ignorant we may be of the nature or necessity of the connection; the very frequency of the association is evidence of the connection; there is no association whatsoever, whether it be moral, natural, or artificial, whether it depend on the nature and constitution of the human mind, the laws of nature, or the artificial manners and habits of society, which is not rendered probable in proportion to the frequency and constancy of the connection. Hence it is, that where circumstances found to be usually associated with the fact in question are known to exist, such associations are connecting links between the known circumstances and the fact, and render its existence more or less probable.*

*851] On the other hand, *it is scarcely necessary to remark, that experience of usual or constant disunion of particular facts and circumstances necessarily renders their future association unlikely and improbable, and is a proper inducement to disbelief more or less strong according to circumstances.

It is further to be remarked, that the force of evidence resulting from the concurrence of circumstances depends not merely upon the degree of probability that those coincidences were merely casual and fortuitous, but frequently also upon that improbability, compounded with the further improbability that another hypothesis is true which is not supported by any circumstances. Thus in a criminal case where all the circumstances of time, place, motive, means, opportunity, and conduct, concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of any other agent, although had any other existed, he must have been connected with the perpetration of the crime by motive, means, and opportunity, and by circumstances necessarily accompanying such acts, which usually leave manifest traces behind them.

In estimating the force of a number of circumstances tending to the proof of the disputed fact, it is of essential importance to con-

* A striking instance, to show the extent to which philosophical inferences may be carried by means of careful observation and analogical reasoning, may be derived from the science of comparative anatomy. From a single fossil bone of an animal, whose very species is extinct, a skilful anatomist is able to represent the original animal perfect in all its parts; see Cuvier's *Fossil Remains*.

sider whether they be dependent or independent. If the facts *A*, *B*, *C*, *D*, be so essential to the particular inferences to be derived from them, when established, that the failure in the proof of any one would destroy the inference altogether, they are dependent facts; if, on the other hand, notwithstanding the failure in proof of one or more of those facts, the rest would still afford the same inference or probability as to the contested fact which they did before, they *would be properly termed independent facts.^f [*852
The force of a particular inference drawn from a number of dependent facts is not augmented, neither is it diminished, in respect of the number of such independent facts, provided they be established; but the probability that the inference itself rests upon sure grounds, is, in general, weakened by the multiplication of the number of circumstances essential to the proof; for the greater the number of circumstances essential to the proof is, the greater latitude is there for mistake or deception. On the other hand, where each of a number of independent circumstances, or combinations of circumstances, tends to the same conclusion, the probability of the truth of the fact is necessarily greatly increased in proportion to the number of those independent circumstances.^g

It seems to have been considered, that even mere coincidences, although not of an exclusive nature, may by their number and joint operation be sufficient to constitute a conclusive proof.^h It rarely however happens *in practice, that circumstantial [*853 proofs consists purely in mere natural and mechanical

^f Quando le prove di un fatto tutte dipendono egualmente da una sola, il numero delleprove non aumente nè sminuisce la probabilità del fatto, perchè tutto il loro valore si resolve nel valore di quella sola da cui dipendono. Quando le prove sono indipendenti, l'una dall' altra, cioè quando gli indizi si provano altronde che da se stessi, quanto maggiori prove si adducono tanto più cresce la probabilità del fatto, perchè la fallacia di una prova non influisce sull' altra; Beccaria, s. 14.

^g *Infra*, note (i).

^h Matthæus de Crim.: *Possunt diversa genera ita conjungi ut quæ singula non nocerent ea universa tanquam grando reum opprimunt.*—According to Beccaria, chap. 14: Possono distinguersi le prove di un reato in perfette ed in imperfette. Chiamo perfette quelle che escludono la possibilità che un tale non sia reo; chiamo imperfette quelle che non la escludono. Della prima anche una sola è sufficiente per la condanna, delle seconde tante son necessarie quante bastino a formarne una perfetta, vale a dire che se per ciascuna di queste in particolare è possibile che uno non sia reo, per l'unione loro nel medesimo soggetto è impossibile che non lo sia; Beccaria, s. 14.—*Singula levia sunt et communia, universa vero nocent etiam si non ut fulmine, tamen ut grandine*; Quintil.

coincidences, unconnected with any of a moral nature and conclusive tendency.

The probability derived from the concurrence of a number of independent probabilities increases not in a merely cumulative, but in a compound and multiplied proportion.¹ This is a conse-

¹ According to the principles of pure abstract mathematical reasoning, the probability arising from the concurrence of a number of independent circumstances, each of which induces a probability in favour of a particular event, is *compounded* of all the probabilities incident to the individual circumstances. When, therefore, the circumstantial probabilities are each considerable, the compound probability in favour of the event increases by a rapid progression. If the circumstances, *A*,

B, *C*, severally induce probabilities in favour of an event represented by $\frac{a}{m} \frac{b}{m} \frac{c}{m}$,

that is, if in every *m* cases the circumstance *A* necessarily involved the event in question *a* times, and excluded it $\overline{m-a}$ times, and so on, and the circumstances *A*, *B*, *C*, were wholly independent of each other, then the probability of the event, arising from the happening of all these circumstances, would be to the probability against it as $\overline{m^3 - \overline{m-a} \cdot \overline{m-b} \cdot \overline{m-c}}$ to $\overline{m-a} \cdot \overline{m-b} \cdot \overline{m-c}$.

If the witnesses, *A*, *B*, *C*, bore testimony to independent facts, each of which, if true, involved the truth of a particular event, and *A* were the witness of truth in *a* cases, and his testimony were false in $\overline{m-a}$ cases, and so of the testimony of *B*, and of *C*, then the probability of the event, arising from their joint testimony, would be to the probability against it in the ratio above expressed.

And if $m=2$ and $a=b=c=1$, the probability in favour of the event would be to the probability against it as 7 : 1.

Again, if the probability in favour of a particular fact, arising from the testimony of *A*, were to the probability against it as $a : \overline{m-a}$, and so on, as to the testimony of *B* and *C*, the probability of the fact from their united testimony would be to the probability against it as $a \cdot b \cdot c$ to $\overline{m-a} \cdot \overline{m-b} \cdot \overline{m-c}$. And if $m=2$ and $a=b=c=1$, the ratio would be that of 1 : 1; that is, their united testimony would produce no increase of probability in favour of the fact.

Such considerations admit but of a very partial and limited application in the investigation of questions arising out of the common concerns of life. The basis of all such calculations is a comparison of all the different cases which involve the particular event with those which exclude it, which assumes the possibility of resolving all possible cases, which either involve or exclude the event, into a definite number of the one class and of the other, each of which is equally likely to happen.* The most complicated and laboured analytical results on the subject of probabilities, are little more than modifications of this comparison. It is obvious, upon the slightest consideration, that the probability of error or mistake on the part of a witness, or of his honesty and sincerity, usually admits of no such comparison; still less can the complicated transactions of life, dependent as they are

* Wood's Algebra. Laplace, *Théorie Analytique des Probabilités*.

quence derived from pure abstract *arithmetical principles. For although no definite arithmetical ratio can be assigned to each independent probability,* yet the principle of increase must obtain wherever independent probabilities in

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upon an almost infinite variety of circumstances and motives, be subjected to such an analysis. But the principle may no doubt operate by way of approximation, although the concurrent probabilities may admit of no numerical measure; and whenever probabilities are deducible from independent circumstances, the degree of probability must necessarily be multiplied by their concurrence. In criminal cases, however, it seems to be perfectly clear in principle that the conjoint effect of circumstances, which individually are inconclusive in their nature, cannot in its nature be conclusive, unless the resulting probability be indefinite, and exceed the powers of calculation. Where mere independent and unconnected circumstances are in their nature imperfect and inconclusive, the degree of probability which results from their united operation, although greatly increased in degree, must still in its nature be definite and inconclusive, and therefore inadequate to the purposes of conviction. Let it, for instance, be supposed that *A* is robbed, and that the contents of his purse were one penny, two sixpences, three shillings, four half-crowns, five crowns, six half-sovereigns and seven sovereigns, and that a person, apprehended in the same fair or market where the robbery takes place, is found in possession of the same remarkable combination of coin, and of no other, but that no part of the coin can be identified, and that no circumstances operate against the prisoner except his possession of the same combination of coin: here, notwithstanding the very extraordinary coincidences as to the number of each individual kind of coin, although the circumstances raise a high probability of identity, yet it still is one of an indefinite and inconclusive nature.

On the other hand, evidence of a *conclusive* nature and tendency is restricted by no limits of mere probability. In the case of the ordinary presumption that an admission of a fact made by a party contrary to his obvious interest is truly made, the probability that the admission is true far exceeds the limits of mere numerical comparison. In some instances mere mechanical coincidences are of this description. Thus, in the ordinary case, where cloth is cut and stolen from a loom, the perfect coincidence between cloth found in the possession of the prisoner and the remnant left behind, is of this description; the probability of identity arising from the perfect coincidence of the severed threads exceeds the bounds of arithmetical calculation, and deprives the mind of all power of attributing such a series of coincidences to mere accident.

But even in criminal cases, where a high degree of probability results from repeated coincidences, although that probability be of a definite and numerical nature, such coincidences may, in conjunction with others, constitute a complete and satisfactory proof. Thus, in the case already supposed, of a singular coincidence between the quantity and description of coin stolen with that found in the possession of the prisoner, although the fact, taken nakedly and alone, without any collateral evidence, would in principle be inconclusive, yet, if coupled with circumstances of a conclusive tendency, such as flight, concealment of the money, false and fabricated statements as to the possession, it might afford strong and pregnant evidence of guilt for the consideration of the jury.

favour of an event concur, although they cannot be precisely measured by space or numbers; and even although every distinct probability which is of a conclusive tendency exceeds every merely definite numerical ratio.

It is nevertheless to be remarked, that wherever mere inconclusive probabilities concur, the result, however the degree of probability may be increased by the union, will still be of an indefinite and inconclusive nature. And hence it seems, that in criminal cases the mere union of a limited number of independent circumstances, each of which is of an imperfect and inconclusive nature, cannot afford a just ground for conviction.

On the other hand, the force of circumstances of a conclusive nature may be greatly confirmed and strengthened by their combination with other and independent circumstances, which render the fact probable, although the *latter be in themselves of an imperfect and inconclusive nature. Again it is to be observed, that although in the course of judicial proofs the number of concurring probabilities is usually limited, yet that cases may be put where the number and extent of the coincidences are so great as to exceed all definite limits, and where, consequently, the resulting probability is of a conclusive nature.[†]

It is to be remarked, that in thus referring to the doctrine of numerical probabilities, it is the principle alone which is intended to be applied, in order that some estimate may be formed of the force of independent and concurring probabilities. The notions of those who have supposed that mere moral probabilities or relations could ever be represented by numbers or space, and thus be subjected to arithmetical analysis, cannot but be regarded as visionary and chimerical.

From this short view of the subject, it appears to be essential to circumstantial proof, First, *that the circumstances from which the conclusion is drawn be fully established.* If the basis be unsound, the superstructure cannot be secure. The party upon whom the burthen of proof rests is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance. It is obvious that proof of this nature is more strong and cogent where the circumstances are numerous, and derived from many different and independent sources, than where they are but few, and depend on the credit and testimony

[†] See the preceding note.

of one or two witnesses. Where all the circumstances rest on the testimony of a single witness the evidence can never be superior to the lowest degree of direct evidence, and must frequently fall below it: for in addition to the question, whether the witness was trustworthy, *another question would arise; that is, whether the inference was correctly drawn from the facts which he was supposed to prove. [*857

It is obvious that the number of circumstances stated by a witness does not add to the force of his direct testimony, unless they be such as admit of contradiction if his testimony be false.

The number of circumstances is not essential, inasmuch as it repels any suspicion of fraud, but from the consideration that the greater the number of circumstances is, the greater will be the certainty as to the conclusion deduced. A few circumstances may be consistent with several solutions; but the whole context of circumstances can consist with one hypothesis only; and the wider the range of circumstances is, the more certain will it be that the hypothesis which consists with, and reconciles them all is the true one.

Although all facts and circumstances connected with the subject of inquiry be admissible in evidence to explain its nature, and although all facts must necessarily be consistent with truth, yet it is to be recollected that facts themselves may be simulated and fabricated with a view to deceive and mislead. Such facts, however, are necessarily exposed to great danger of detection, from the obvious difficulty of uniting by artful means that which is false with that which is genuine, and thus substituting a false and artificial for a real consistency and context of circumstances.

The great difficulty of practising frauds of this description, and their liability to detection from a careful examination and comparison of circumstances, will be best elucidated by a few examples. Attempts at this kind of deception have not unfrequently been made with a view to conceal the crime of murder, and in order to produce belief that the party died from natural or accidental causes, or was *felo de se*: in the detection of such *impostures the testimony of medical practitioners cannot be too highly appreciated. [*858

The remarkable case of Sir Edmundbury Godfrey may be cited as an instance of this kind.^k The deceased was found in a ditch at Chalk Farm, in the neighborhood of London, his own sword passing through his body, so that the end projected two hands' breadth be-

^k 7 How. St. Tr. 159.

hind the back; his gloves and some other things were laid on the bank so as to excite a belief that he had destroyed himself. But there was no blood about the place, and upon drawing the sword out of the body no blood followed. The body was discolored and bruised, and the neck so flexible that the chin could be turned from one shoulder to the other. The deceased had in fact been strangled.

In the State Trials a very singular case of the same description is also mentioned, of a woman who was found in bed with her throat cut: her husband's relations (the husband being absent from home at the time) occupied the apartment adjoining to the chamber of the deceased, and there was no access to her chamber but through their apartment. The relations, who thus occupied the adjoining apartment, had arranged matters so that it might be supposed that the deceased had destroyed herself; but one circumstance amongst others was conclusive to destroy this supposition, for on the *left* hand of the deceased was observed the bloody mark of a *left* hand, which of course could not have been that of the deceased.

Another instance, cited in an able work on Medical Jurisprudence,¹ is to this effect:—A citizen of Liege was found shot, and his own pistol was discovered lying near him, and no person had been seen to enter or to leave the house of the deceased; from these circumstances it was concluded that he had destroyed himself, but on *859] **examining the ball by which he had been killed it was found to be too large to have been discharged from that pistol, in consequence of which suspicion fell upon the real murderer.*

Secondly: It is essential *that all the facts should be consistent with the hypothesis*. For as all things which have happened were necessarily congruous and consistent, it follows, that if any one established fact be wholly irreconcilable with the hypothesis, the latter cannot be true. Such an incongruity and inconsistency is sufficient to negative the hypothesis, even although it coincide and agree with all the other facts and circumstances of the case to the minutest extent. Undoubtedly such an intimate coincidence in other respects would suggest the necessity of investigating the truth of the incongruous circumstances with great caution; yet if the incongruity could not eventually be removed, the hypothesis would fall, although no other could be suggested.^m

¹ By Dr. Paris and J. S. M. Fonblanque; see also the publications on the same subject, by Dr. Smith, Dr. Male, and Dr. Taylor.

^m It was on this principle that the French philosophers opposed Newton's system of the world. They objected that the calculations formed upon the hypo-

Thirdly: It is essential *that the circumstances should be of a conclusive nature and tendency*. Evidence is always indefinite and inconclusive, when it raises no more than a limited probability in favor of the fact, as compared with some definite probability against it, whether the precise proposition can or cannot be ascertained. It is, on the other hand, of a conclusive nature and tendency, when the probability in favor of the hypothesis exceeds all arithmetical or definite limits.

Such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true: for it is the actual *exclusion of every hypothesis which invests mere circumstances with the force [*860 of proof. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be. To hold that any finite degree of probability shall constitute proof adequate to the conviction of an offender, would in reality be to assert, that out of some finite number of persons accused, an innocent man should be sacrificed for the sake of punishing the rest; a proposition which is as inconsistent with the humane spirit of our law as it is with the suggestions of reason and justice. The maxim of law is, that it is better that ninety-nine (*i. e.* an indefinite number of) offenders should escape, than that one innocent man should be condemned.

Thus, in practice, where it is certain that one of two individuals committed the offence charged, but it is uncertain whether the one or the other was the guilty agent, neither of them can be convicted.

The principle extends to all cases where the ultimate tendency of the evidence is of an inconclusive nature; that is, where admitting all to be proved which the evidence tends to prove, the guilt of the accused would be left either wholly uncertain, or dependent upon some merely definite probability.^a

thesis made the motion of the moon's apsides but one-half as great as they were proved to be by actual observation. It was afterwards discovered that the error was in neglecting a tangential force in the calculation; and it was found that when this was taken into the account, the theoretical result coincided with the fact.

^a The very remarkable case of Mr. Barnard, who was tried on a charge of sending a threatening letter to the Duke of Marlborough, affords an illustration of these positions. The Duke was twice required, by letter, to meet the writer, and on both occasions was met by the prisoner: the one place of assignation was near a particular tree in Hyde Park; the other, in an aisle of Westminster Abbey. That

*861] *It is very possible, indeed, that mere coincidences may be so numerous, as by force of multiplied probability to exclude all reasonable doubt; but this can never happen in the absence of circumstances of a conclusive tendency, unless the probability be increased to an indefinite extent beyond the reach of mere calculation. Whenever the probability is of a definite and limited nature (whether in the proportion of one hundred to one, or of one thousand to one, or any other ratio, is immaterial), it cannot be safely made the ground of conviction; for to act upon it in any case would be to decide that, for the sake of convicting many criminals, the life of one innocent man might be sacrificed.

The distinction between evidence of a conclusive tendency which is sufficient for this purpose, and that which is inconclusive, seems to be this: the latter is limited and concluded by some degree or other of finite probability, beyond which it cannot go; the former, though not demonstrative, is attended with a degree of probability of an indefinite and unlimited nature.

It frequently happens, as has been seen, that where the evidence of the circumstances attending the transaction itself would be imperfect and inconclusive, it derives a conclusive nature and tendency from a consideration of the conduct of the accused. The ordinary motives of self-preservation and self-interest, common to all mankind, furnish the strongest presumption that a party would explain, by statement at all events, and by proof where *it was practicable, such evidence as tended to his prejudice. Hence it is that circumstances, which abstractedly considered would be inconclusive, acquire a conclusive character and tendency from the silence of the adversary, or his failure in attempting to explain them.*

Where the evidence to prove larceny consists in the recent possession of the stolen property, it is in itself imperfect and incon-

Mr. Barnard should, by mere accident, have been at both places at the very time appointed for the meetings was certainly most remarkable: yet, notwithstanding the strong degree of suspicion created by such coincidences, they were clearly insufficient, without more, to warrant a conviction. The prisoner was, nevertheless, put upon his defence, and produced evidence to show that those coincidences were purely accidental. Perhaps the real clue to the transaction may be this, that the prisoner was a party to the transaction, although no real intention existed of profiting by the contrivance. The rank and situation of the prisoner in society, and the obvious impossibility of his ever enjoying that which he demanded, are circumstances strongly tending to exclude such a supposition, and the nature and style of the demand render it probable that the real object of the writer was not personal gain.

* *Supra*, p. 845.

clusive. But if the evidence of possession be coupled with the consideration, that the party charged, having it in his power to account for the possession, if it really consist with his innocence, either refuses to account for the possession, or attempts to impose a false account, the evidence is then conclusive in its nature and tendency, and is proper for the consideration of the jury.

Fourthly: It is essential *that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.*^p

Hence results the rule in criminal cases, that the coincidence of circumstances to indicate guilt, however strong and numerous they may be, avails nothing, unless the *corpus delicti*, the fact that the crime has been actually perpetrated, be first established. So long as the least doubt exists as to the *act*, there can be no certainty as to the criminal agent. Hence, upon charges of homicide, it is an established rule, that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body: a rule warranted by melancholy experience of the conviction and execution of supposed offenders, charged with the murder of persons who survived their alleged murderers; as in the case of the uncle already alluded to, cited by Sir Edward Coke and Lord Hale. So Lord Hale recommends that no prisoner shall be convicted of larceny in stealing the goods of a person unknown, unless the fact of the robbery be previously *proved.^q The same principle requires that upon a charge of homicide, even when the body has been found, and [*863 although indications of a violent death be manifest, that it shall still be fully and satisfactorily proved that the death was neither occasioned by natural causes,^r by accident, nor by the act of the deceased himself. In considering the probability of the latter supposition, it is to be recollected that it is by no means improbable that a person bent on self-destruction would use precautions to protect his memory from ignominy, and his property from the forfeiture, consequent on a verdict of *felo de se*.^s

^p *Hedge's case*, 2 Lew. C. C. 227.

^q See tit. LARCENY.

^r See the trial of Spencer Cowper, for the alleged murder of Sarah Stout; 13 How. St. Tr. 1105. The doubt which arose in that case upon the conflicting evidence, whether the death of the deceased had been occasioned by mere accident, or by her own act, or by the act of another, afforded, as it seems, a decisive ground of acquittal.

^s In a little work, entitled *The Theory of Presumptive Proof*, is cited the case of Thomas Harris, who was executed at York, for the murder of James Gray, in

The force of circumstantial evidence being exclusive in its nature and the mere coincidence of the hypothesis with the circumstances being in the abstract insufficient, unless they exclude every other supposition, it is essential to inquire, with the most scrupulous attention, what other hypotheses there may be which may agree wholly or partially with the facts in evidence. Those which agree even partially with the circumstances are not unworthy of examination, because they lead to a more minute examination of those facts with *864] which at first they might appear to be inconsistent; and it is possible that upon a more minute investigation of those facts their authenticity may be rendered doubtful, or may be even altogether disproved. In criminal cases the statement made by the accused is in this point of view of the most essential importance. Such is the complexity of human affairs, so infinite the combinations of circumstances, that the true hypothesis which is capable of explaining and reconciling all the apparently conflicting circumstances of the case, may escape the acutest penetration; but the prisoner, so far as he alone is concerned, can always afford a clue to them; and though he be unable to support his statement by evidence, his account of the transaction is for this purpose always most material and important. The effect may be, on the one hand, to suggest a view of the case which consists with the innocence of the accused, and which might otherwise have escaped observation; on the other hand, its effect may be to narrow the question to the consideration whether that statement be or be not excluded and falsified by the evidence.

The recent possession of stolen property is, independently of the conduct and declarations of the accused, or his silence, very imperfect evidence of guilt; the apparent possession may have resulted from the malicious act of some other person. In a case, therefore, where no act of concealment or assumption of property can be proved, and the accused is consistent in denying all knowledge of possession, such a defence becomes entitled to the most serious attention, and exacts a most rigorous inquiry as to its truth or pro-

the year 1642. According to that statement, Harris kept a public house, and was charged by his man servant, Morgan, with having strangled James Gray, a traveling guest, in his house; upon the testimony of Morgan, aided by some circumstantial evidence, as to the prisoner's having on the same morning concealed some money in his garden, the prisoner was convicted and executed, although *no marks of violence* appeared on the body of the deceased, and who had in fact died of apoplexy, as appeared by the subsequent confession of the witness himself.

bability ; where, on the other hand, the prisoner admits the possession, and attempts to account for it by a false statement, the necessity for such an inquiry does not arise.*

*What circumstances will amount to proof can never be matter of general definition ; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt ; even direct and positive testimony does not afford grounds of belief of a higher and superior nature. To acquit upon light, trivial and fanciful suppositions and remote conjectures, is a virtual violation of the juror's oath, and an offence of great magnitude against the interests of society, directly tending to the disregard of the obligation of a judicial oath the hindrance and disparagement of justice, and the encouragement of malefactors. On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest ; and in no case, as it seems, ought the force of circumstantial evidence sufficient to warrant conviction, to be inferior to that which is derived from the testimony of a single witness, the lowest degree of direct evidence. [*865]

*Lastly : It seems that mere circumstantial evidence ought in no case to be relied on where direct and positive evidence, which might have been given, is wilfully withheld by the prosecutor. Where direct evidence is attainable, circumstantial evidence is of a secondary nature ; besides, the great excellence of indirect evidence [*866]

† A lamentable case occurred some years ago, (I state from common report only) which strongly illustrates the necessity of exerting the utmost vigilance in negating satisfactorily every other possible hypothesis, in a case of purely circumstantial evidence. A servant girl was charged with having murdered her mistress. The circumstantial evidence was very strong ; no persons were in the house but the murdered mistress and the prisoner, the doors and windows were closed and secure, as usual ; upon this and some other circumstances the prisoner was convicted, principally upon the presumption, from the state of the doors and windows, that no one could have had access to the house but herself, and she was accordingly executed. It afterwards appeared, by the confession of one of the real murderers, that they had gained admission to the house, which was situated in a narrow street, by means of a board thrust across the street, from an upper window of the opposite to an upper window of the house of the deceased ; and that the murderers retreated the same way, leaving no trace behind them.

is its freedom from suspicion, and no greater discredit can be thrown upon it than by the withholding of direct evidence.

Thirdly, with respect to cases of conflicting evidence. The first step in the process of inquiry in these cases must naturally and obviously be, to ascertain whether the apparent inconsistencies and incongruities which such evidence presents may not without violence be reconciled, and if not, to what extent, and in what particulars, the adverse evidence is irreconcilable; and then, by careful investigation and comparison, to reject that which is vicious; and thus, if it be practicable, to reduce the whole to testimony and circumstances of uniform and consistent tendency.

Where the testimony of direct witnesses is apparently at variance, it is to be considered, in the first place, whether they be not in reality reconcilable, especially where there is no extrinsic reason for suspecting error or fraud. But if their statements upon examination be found to be irreconcilable, it becomes an important duty to distinguish between the misconceptions of an innocent witness, which may not affect his general testimony, and wilful and corrupt misrepresentations which destroy his credit altogether. The presumption of reason as well as of law in favor of innocence, will attribute a variance in testimony to the former rather than the latter origin. Partial incongruities and discrepancies in testimony, as to collateral points, are, as has been already observed, to be expected; and it is for a jury to determine whether in the particular instance they are of such a nature and character, under all the circumstances, that they may be or cannot be attributed to mistake. In estimating the *probability of mistake and error, and also in deciding *867] on which side the mistake lies, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention, or of attention to particular subject-matters. A physician or surgeon would be much more likely to observe particular symptoms or appearances in a medical or surgical case; and to form from them correct conclusions, than an unskilful and inexperienced person would be likely to do. Much must also depend upon a comparison of the means and opportunity which the witnesses had for making observations, of the circumstances which were likely to excite and engage their attention, and of their reasons and motives for attending; and here it is to be observed, that there is an important distinction between positive and negative testimony.

If one witness were positively to swear that he saw or heard a

fact, and another were merely to swear that he was present, but did not see or hear it, and the witnesses were equally trustworthy, the general principle would, in ordinary cases, create a preponderance in favor of the affirmative; for it would usually happen that a witness who swore positively, minutely, and circumstantially to a fact which was untrue, would be guilty of perjury, but it would by no means follow that a witness who swore negatively would be perjured, although the affirmative were true; the falsity of the testimony might arise from inattention, mistake, or defect of memory; and therefore, even independently of the usual presumption in favor of innocence, the probability would be in favor of the affirmative. If, for instance, two persons should remain in the same room for the same period of time, and one of them should swear that during that time he heard a clock in the room strike the hour, and the other should swear that he did not hear the clock strike, it is very possible that the fact might be true, and yet each might swear truly. It is not only possible, but probable that the latter *witness, though in the same room, through inattention, might be unconscious of the fact, or, being conscious of it at the time, that the recollection had afterwards faded from his memory. It follows, therefore, by way of corollary to the last proposition, that in such cases, unless the contrary manifestly appear, the presumption in favor of human veracity operates to support the affirmative. [*868

And further, when, in cases of conflicting testimony, upon a comparison between the witnesses in respect of the means and opportunity which they have had of ascertaining the facts to which they testify, it turns out that the one class has had more competent and adequate means of information than the other; or that, under the circumstances, the attention of the latter was not so likely to be so fully excited and particularly directed to the facts, this principle co-operates with the weight of evidence in favor of the former, in all cases where there is room for error or mistake.

The application of this principle supposes that the positive can be reconciled with the negative testimony without violence and constraint. Evidence of a negative nature may, under particular circumstances, not only be equal, but superior, to positive evidence. This must always depend upon the question, whether, under the particular circumstances, the negative testimony can be attributed to inattention, error, or defect of memory. If, in the instance above supposed, two persons were placed in the room where the clock was, for the express purpose of ascertaining by their senses whether it

would strike or not, there would be little room to attribute the variance between their negative testimony and the positive testimony of a third witness to mistake or inattention, and the real question would be as to the credit of the witnesses.

It is also observable that this principle is inapplicable, where a negative depends on the establishment of an opposite positive fact. Thus an *alibi* negatives the actual commission of a crime by the *869] prisoner; but the evidence *is of as direct and positive a nature as that which tends to prove his presence and actual commission of the crime.

Where the testimony of conflicting witnesses is irreconcilable, and cannot be attributed to incapacity or error, it frequently becomes a painful and difficult task to decide to which class credit is due. And here it is to be observed, in the first place, that all those considerations which have been applied as tests of the credit and veracity of witnesses uncontradicted, are also tests of credibility in cases of conflict. The first point of comparison is their character for integrity. This may either depend on positive evidence as to their previous situation,^a conduct and character, or

^a The Roman law was far more copious than our own, in its rules of exclusion. *Consequens est, ut in omnibus causis fidem testium eleuet ætas puerilis, insania, conditio vitæ, turpitude, paupertas, magnum opprobrium, &c.*; Heinecc. El. J. C. Part IV. sec. cxxxviii. L. 10, ff. L. 10, c. h. t.—*Nec servorum testimonio credendum esse, nisi alia desit ratio veritatem eruendi*; *Ib.* sec. cxxxviii. L. 7, ff. h. f.—*Vacillare fidem mulierum quæ quæstum corpore fecerunt*; L. 3, § 5, h.—*Eorum qui vitam ad cultrum vel ad depugnandas bestias locarunt*; L. 3, § 5, h. f.—*Omnium viliorum et pauperum quamdiu aliorum est copia*; L. 3, ff. L. 18, c. h. t.—*Ut merito repellantur patur in causâ filii, filius in causâ patris, aliique potestati vel imperio alterius, subjecti, vel domestici*; L. 6, L. 9, L. 24, f. L. 3, L. c. h. t.—*Ut suspecti etiam sunt amici et inimici*; L. 3, pr. ff. L. 5, L. 17.—Although a proper sense of the sacred obligation of an oath may be equally strong in every condition of society, yet the temporal consequences of detected perjury or prevarication may frequently depend much on the witness's rank or situation in life. To a common laborer, the temporal consequences of a violation of his oath would probably be confined merely to temporal punishment, and that only upon a conviction after an expensive legal process; whilst to a solicitor or attorney, whose professional existence depends upon his reputation and credit, loss of character consequent upon detection, although there should be no conviction, might end in his ruin. Considerations of this nature must obviously possess a contrary tendency, where the testimony of a witness tends to repel and remove some charge of improper conduct, which would otherwise affect his reputation. Thus, upon a question, whether a testator was capable of executing a will, a professional witness, whether legal or medical, has an interest in proving the capacity; for the fact that he had made or even witnessed a will, executed by one utterly

*may be matter of inference and presumption, from their relative situation as to the parties, or the subject matter of the cause, and the various and almost innumerable circumstances by which their testimony may be influenced or biassed. Where testimony is equally balanced in all other respects, a slight degree of interest or connection may be sufficient to turn the scale. In such cases, also, any variance in the testimony of the witness from a former statement relating to the same transaction, if it be established and not explained, necessarily tends to impeach either his integrity or his ability. [*870]

All those circumstances which were likely to influence and bias witnesses in favour of the party, are of course entitled to great consideration in weighing their credit, although they do not exclude their testimony. These are of too obvious and extensive a nature to require enumeration: not only may the stronger motives arising from the ties of consanguinity, friendship, or expectation of future gain, cast a doubt upon the credit of witnesses whose testimony is contrasted with that of persons who stand wholly indifferent, but so also in cases where, in other respects the weight of testimony is nicely balanced, nay many considerations of an inferior and weaker description; such as the interest which the witness may possess in a similar question, or the bias and prejudice which may arise in favour of a party from connection in the way of trade, profession, or membership of any description: * considerations of this kind, which would frequently afford not the slightest ground for questioning the credit of an unimpeached* witness, may become of essential importance [*871] when the credit of conflicting witnesses is in other respects in a state of equipoise.

Such considerations become still more important where any suspicion arises from the manner and demeanour of the witness in delivering his testimony. These, indeed, frequently afford strong tests for judging of his sincerity, although his motive be not apparent. Manifestations of warmth and zeal beyond those

incapable of making one, would affect his professional character. Such observations apply in those cases only of doubt and suspicion where the evidence is of a conflicting nature.

* Parimente le credibilità di un testimonio puo essere alcuna volta sminuita quand' egli sia membro d' alcuna società privata, di cui gli usi, e le massime siano o non ben conosciute o diverse dalle puliche. Un tal uomo ha non solo le proprie ma le altrui passioni; Beccaria, c. 13.

which the occasion naturally calls for, over-forwardness in testifying that which will benefit the party for whom he testifies, and ill-concealed reluctance in declaring that which tends to his prejudice, flippancy and levity of manner, coldness and apathy in describing injuries which would naturally excite a contrary feeling, indications of subtlety, artifice and cunning, are, with a multitude of others, tests for estimating the true character of a witness and the value of his testimony.

But above all, where the credit of conflicting witnesses is doubtful, as far as regards their number, their integrity, their means of knowledge, and the consistency and probability of their testimony, a comparison of their statements with each other, and with undisputed or established facts, is a great test of credibility.

The relative consistency of testimony is a most important test of comparison. The testimonies of witnesses of truth will consist with each other, and with all the established circumstances of the case, in numerous and minute particulars, which are frequently beyond the reach of invention,⁷ and will exhibit that degree of
 *872] solid coherency *which necessarily results from a real and actual connection and congruity in nature, which minuteness and detail of circumstances will serve but to render more complete: with false witnesses the very reverse takes place; their testimony must either be sparing in circumstances, and therefore of a nature obviously suspicious, or be liable to detection from comparing the invented circumstances with each other, and with those which are known to be true.

In cases of conflicting testimony, and particularly where the subject of litigation is remote in point of time, or the question depends upon the terms of oral communications, the evidence of written documents connected with the transaction are, on account of their permanency, of the most obvious and essential importance. Every day furnishes instances of the weakness of human memory in such cases, and great opportunity is afforded for misrepresen-

⁷ Dr. Paley, with reference to historical evidence, says, "The undesignedness of coincidences is to be gathered from their latency, their minuteness, their obliquity; the suitableness of the circumstances in which they consist to the places in which those circumstances occur, and the circuitous references by which they are traced out, demonstrate that they have not been produced by meditation or by any fraudulent contrivance; but coincidences from which these causes are excluded, and which are too close and numerous to be accounted for by accidental concurrence of fiction, must necessarily have truth for their foundation."

tation or mistake; whilst writings are permanent, and, as has well been observed, are witnesses difficult to be corrupted.^z

As the depositions of dead or absent witnesses are, in point of law, of a secondary nature to the *vivâ voce* testimony of witnesses subjected to the ordeal of cross-examination, so are they inferior and weaker in point of force and effect. So true is it, that a witness will frequently depose that in private, which he would be ashamed to certify before a public tribunal.^a It is by the test of a public examination, and by that alone, that the credit of a witness, both as to honesty and ability, can be thoroughly tried and appreciated.^b *Nam minus obstitisse videtur pudor inter paucos signatores,*^c is an acient and a powerful observation in favour of oral testimony.

As the credit due to a witness is founded in the first *in-stance on general experience of human veracity, it follows [*873 that a witness who gives false testimony as to one particular, cannot be credited as to any, according to the legal maxim, *falsum in uno, falsum in omnibus*. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected.

It is scarcely necessary to observe, that this principle does not extend to the total rejection of a witness whose misrepresentation has resulted from mistake or infirmity, and not from design; but though his honesty remain unimpeached, this is a consideration which necessarily affects his character for accuracy. Neither does the principle apply to testimony given in favour of the adversary; such evidence is rather to be considered as truth reluctantly admitted, and divulged only because it was not in the power of a corrupt witness to conceal it. Hence it is a general principle, that a jury may believe that which makes against his point who swears, although they do not believe that which makes for it.^d

The rejection of the witness may not be the only consequence of detection; for if there be reason to suppose, from the circum-

^z Montesquieu, *Espr. de Loix*, l. 28, c. 44.

^a 3 Bl. Comm. 373.

^b *Supra*, p. 34; see Pothier, by Evans, vol. ii. p. 235.

^c Quinctil. l. 5, c. 6.

^d See Lord Mansfield's observations in *Bermon v. Woodbridge*, Doug. 781.

stances, that his perjury or prevarication is the result of subornation, it affords a reasonable ground, in a doubtful case, for suspecting the testimony of other witnesses adduced by the same party. This observation has no weight where it is apparent that the imputation is merely personal, and results from collateral motives independent of the cause.

The presumption is always *prima facie*, and in the absence of *874] circumstances which generate suspicion, in *favour of the veracity of a witness; but where the usual and general presumption is encountered by an opposite one, it is necessary that the credit of the witness should be established by some collateral aid, to the satisfaction of a jury. The ordinary case of an accomplice affords an illustration of this application of the principle: his testimony is in practice deemed to be insufficient unless his credit be established by confirmatory evidence.

As it is universally admitted that circumstantial evidence is in its own nature sufficient to warrant conviction, even in criminal cases, and as the test of sufficiency is the understanding and conscience of a jury, it would be superfluous and nugatory to enter into a discussion of the comparative force and excellence of these different modes of proof, where they do not conflict with each other. In the abstract, and in the absence of all conflict and opposition between them, the two modes of evidence do not in strictness admit of comparison; for the force and efficacy of each may, according to circumstances, be carried to an indefinite and unlimited extent, and be productive of the highest degree of probability, amounting to the highest degree of moral certainty. With regard to the comparative force and efficacy of these modes of proof, it is clear that circumstantial evidence ought not to be relied on where positive proof can be had, and that so far the former is merely of a secondary nature.* Hence it seems to be clear that no conviction in a criminal case ought ever to be founded on circumstantial evidence, where the prosecutor might have adduced direct evidence; and in civil cases the resorting to such a practice would, in a doubtful case, be a circumstance pregnant with the strongest suspicion.

The characteristic excellence of direct and positive evidence consists in the consideration that it is more immediate and more *875] proximate to the fact; and if no *doubt or suspicion arise as to the credibility of the witnesses, there can be none as

to the fact to which they testify ; the only question is as to their credit, On the other hand, the virtue of circumstantial evidence is its freedom from suspicion, on account of the exceeding difficulty of simulating a number of independent circumstances, naturally connected and tending to the same conclusion. In theory, therefore, circumstantial evidence is stronger than positive and direct evidence, wherever the aggregate of doubt, arising, first, upon the question, whether the facts upon which the inference is founded are sufficiently established ; and, secondly, upon the question, whether, assuming the facts to be fully established, the conclusion is correctly drawn from them, is less than the doubt, whether, in the case of direct and positive evidence, the witnesses are entirely trustworthy. Where no doubt exists in either case, comparison is useless ; but it is very possible where there is room for suspecting the honesty or accuracy of direct witnesses, that the force of their evidence may fall far short of that which is frequently supplied by mere circumstantial evidence ; and whenever a doubt arises as to the credibility of direct witnesses, it is an important consideration in favour of circumstantial evidence, that in its own nature it is much less liable to the practice of fraud and imposition than direct evidence is ; for it is much easier to suborn a limited number of witnesses to swear directly to the fact, than to procure a greater number to depose falsely to circumstances, or to prepare and counterfeit such circumstances as will without detection yield a false result. The increasing the number of false witnesses increases the probability of detection in a very high proportion ; for it multiplies the number of points upon which their statements may be compared with each other, and also the number of points where their testimony comes in contact with the truth ; and therefore multiplies the danger of inconsistency and variance in the same proportion.

*So, on the other hand, it is exceedingly difficult by artful practice to create circumstances which shall wear the appearance of truth, and tend effectually to a false conclusion. The number of such circumstances must of necessity be limited in their nature ; they must be such as are capable of fabrication by an interested party, and such that their materiality might be forseen. Hence all suspicion of fraud may be excluded by the very number of concurring circumstances, when they are derived from various but independent sources, or by the nature of the circumstances themselves, when either it was not in the power of the adverse

party to fabricate them, or their materiality could not possibly have been foreseen, and consequently where no temptation to fabricate them could have existed.

The correspondence or inconsistency of direct evidence with well-established circumstances, is the great, and frequently the only test, for trying the truth of direct testimony which labours under suspicion. A perjured witness will naturally, with a view to their own security, so frame his fiction as to render contradiction by direct and opposite testimony impracticable. He will also be sparing in his detail of circumstances which are false, and which are capable of contradiction; the more circumstantial his statement is, the more open it is to detection. Hence it is that circumstantiality of detail is usually a test of sincerity, provided the circumstances be of such a nature as to be capable of contradiction if they be false; and that, on the other hand, if a witness be copious in his detail of circumstances which are incapable of contradiction, but sparing of those which are of an opposite kind, his testimony must necessarily be regarded with a degree of suspicion. As circumstances are the best and frequently the only means of detecting false testimony, it follows that no fictions are more formidable and more difficult to be detected than those which are mixed up with a large portion of truth; every circumstance of truth interwoven *877] with the fiction, so *far from being merely negative in its effect, in affording no aid for detecting the fraud, actually tends to confirm and support it.

It is however to be observed, that positive testimony ought not to be rejected on the ground of inconsistency with circumstances, unless the incongruity be of a conclusive and decisive nature. Mere improbability is usually an insufficient ground for the rejection of positive testimony which labours under no suspicion; for experience frequently shows that circumstances do in reality agree and did actually co-exist, although, from ignorance of the numerous links by which they are united and connected, their co-existence would *à priori* have been deemed to be highly improbable.

When, however, the positive testimony labours under doubt and suspicion, mere circumstantial evidence is frequently sufficient to prevail, although such testimony be not wholly and absolutely irreconcilable with the facts. Thus in the case of Mr. Jolliffe's will, the will was established on circumstantial evidence, in opposition to direct testimony of the attesting witnesses.

Where doubt arises from circumstances of an apparently oppo-

site and conflicting tendency, the first step in the natural order of inquiry is to ascertain whether they be not in reality reconcileable, especially where circumstances cannot be rejected without imputing perjury to a witness: for perjury is not to be presumed; and in the absence of all suspicion, that hypothesis is to be adopted which consists with and reconciles all the circumstances which the case supplies. In the next place, where the circumstances are inconsistent and irreconcilable, it becomes necessary to inquire which of them are attributable to error or design. Here again in distinguishing between the real and genuine circumstances, and those which are spurious, regard is to be had to those principles which have already been adverted to: it is rather to be presumed that one witness was mistaken, where there was room for mistake, *than that another witness, where the facts excluded all mistake, was wilfully perjured. Where mistake is out of [*878 the question, an examination of the different degrees of credit due to the witnesses on whose testimony the conflicting circumstances depend, becomes material; and in such cases a careful comparison of the circumstances which they state, with facts either admitted or fully established, is of the most obvious and essential importance. Every admitted or established fact affords an additional test for trying the truth and genuineness of those which are doubtful, by means of which those which are genuine may be established and become additional tests of truth, and those which are false may be rejected.

Whenever any fact is found to be wholly inconsistent with those which are either admitted or indubitably proved, the mere rejection of that single fact, and the difficulty thus removed, is not the only step gained in the progress towards truth; the vicious evidence must have resulted from error or from fraud; and whether under the circumstances it is to be ascribed to the one source or the other, it affords a test for judging of the ability or integrity of the witness, and not unfrequently affords some insight into the conduct of the party.

Frauds in circumstantial evidence are of two kinds: a false witness may swear to circumstances purely fictitious, or an honest witness may swear to circumstances which he has really observed, but which have been prepared with a view to deceive; as in the instance already alluded to, where a discharged pistol was placed near the body of a murdered person, to induce a belief that he had destroyed himself. Those of the former description admit of abso-

lute and positive contradiction, or may be detected by the inconsistency of the fictitious circumstances with those established by unexceptionable testimony; and the witness himself is liable to detection in his attempt to interweave that which he has invented with that which is true. Simulated facts, on the other hand, are
 *879] in themselves true; *they are false only inasmuch as they tend to induce a false conclusion. These, however, are open to detection by a careful comparison with established circumstances; it is beyond the power of human subtlety to create a false consistency of circumstances beyond a very limited extent.^f

No cases of conflicting evidence are more difficult of solution than those where facts apparently well established lead to opposite conclusions. These, in some remarkable instances, are of such a nature as to leave the mind in a state of perplexity after the most patient and laborious investigation. This more especially happens where the obscurity arises from the conduct of the parties concerned; so difficult is it to ascertain the real motives by which the actors in a distant transaction were influenced, or even to determine whether their conduct has not resulted from weakness or caprice, rather than from any settled and determinate principles of action, or from the operation of mixed, fluctuating and transitory motives, which can no longer be distinctly traced. The celebrated *Douglas* cause may be cited as a striking instance of this nature. The gross improbability that *Sir John Stuart* and *Lady Jane* would, under the circumstances, have attempted a monstrous fraud, the effect of which might be to deprive their own future offspring of their legitimate rights, and the vast danger and difficulty of carrying such a scheme into execution, by the procurement of two supposititious children, either by stealth or by bribery, situated as they were, with but slender resources in a foreign capital, under the eye of a vigilant police, were circumstances so strong in favour of the legitimacy of the children, that nothing but the strange and unaccountable conduct of the parties could have induced fair and reasonable doubts upon this interesting and important question. To pursue these considerations further would be inconsistent with
 *880] the limits of *the present treatise. Suffice it to add, that where conflicting probabilities are nicely balanced, it rarely happens that some rule of legal policy does not turn the scale, even in civil cases; and that in criminal proceedings, where reasonable doubts exist, mercy ought to prevail.

^f *Supra*, p. 67.

APPENDIX.

STATUTE 6 & 7 VICT. CAP. LXXXV.

An Act for improving the Law of Evidence.

[22nd August, 1843.]

“WHEREAS the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony;” Now therefore be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this parliament assembled, and by the authority of the same, That no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question or on any inquiry, arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: Provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, *or any person in whose immediate and individual behalf any action may be brought or defended*, either wholly or in part, or the husband or wife of

such persons respectively ; provided also, that this act shall not repeal any *882] provision in a certain act passed in the session of parliament *holden in the seventh year of the reign of his late Majesty and in the first year of the reign of her present Majesty, intituled “An Act for the Amendment of the Laws with respect to Wills :” Provided that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on the part of the plaintiff or of any co-defendant in any such cause, saving just exceptions ; and that any interest which said defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.

II. And be it enacted, That wherever in any legal proceedings whatever legal proceedings may be set out, it shall not be necessary to specify that any particular persons who acted as jurors had made affirmation instead of oath, but it may be stated that they served as jurymen, in the same manner as if no act had passed for enabling persons to serve as jurymen without oath.

III. And be it enacted, That nothing in this act shall apply to or affect any suit, action, or proceeding brought or commenced before the passing of this act.

IV. And be it enacted, That nothing in this act shall extend to Scotland.

STATUTE 14 & 15 VICT. CAP. XCIX.

An Act to amend the Law of Evidence.

[7th August, 1851.]

“WHEREAS it is expedient to amend the law of evidence in divers particulars ;” Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I. So much of sect. 1 of the act of the sixth and seventh years of her present Majesty, chap. 85, as provides that the said act shall “not render competent any party to any suit, action, or proceeding individually named

in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part," is hereby repealed.

II. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding. [*883

III. But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

IV. Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage.

V. Nothing herein contained shall repeal any provision contained in chapter twenty-six of the statute passed in the session of parliament holden in the seventh year of the reign of King William the Fourth and the first year of the reign of her present Majesty.

VI. Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, or the court of common pleas for the county palatine of Lancaster, or the court of pleas for the county of Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the

same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge.

VII. All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the *document sought to be proved be a
 *884] judgment, decree, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

VIII. Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London, shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

IX. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

X. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

XI. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of *justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any of such colonies by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same. [885

XII. Every register of a vessel kept under any of the acts relating to the registry of British vessels may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of one shilling; and every such register or such copy of a register, and also every certificate

of registry, granted under any of the acts relating to the registry of British vessels, and purporting to be signed as required by law, shall be received in evidence in any court of justice, or before any person having by law or by consent of parties, authority to hear, receive, and examine evidence, as *prima facie* proof of all the matters contained or recited in such register when the register or such copy thereof as aforesaid is produced, and of all the matters contained or recited in or endorsed on such certificate of registry when the said certificate is produced.

XIII. "And whereas it is expedient, as far as possible to reduce the expense attendant upon the proof of criminal proceedings: Be it enacted, That whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

XIV. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence; provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which *886] officer is hereby required to furnish such *certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding four pence for every folio of ninety words.

XV. If any officer authorized or required by this act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable upon conviction, to imprisonment for any term not exceeding eighteen months.

XVI. Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties

authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.

XVII. If any person shall forge the seal, stamp or signature of any document in this act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not exceeding three years nor less than one year, with hard labour; and whenever any such document shall have been admitted in evidence by virtue of this act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court, or other proper person, for such period and subject to such conditions as to the said court or person shall seem meet; and every person who shall be charged with committing any felony under this act or under the act of the eighth and ninth years of her present Majesty, chapter one hundred and thirteen, may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he shall be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district or place in which the principal offender may be tried.

XVIII. This act shall not extend to Scotland.

XIX. The words "British colony," as used in this act, shall apply to all the British territories under the government of the East India Company, and to the islands of Guernsey, Jersey, Alderney, Sark, and Man, and to all other possessions of the British crown, wheresoever, and whatsoever.

XX. This act shall come into operation on the first day of November in the present year.

*887]

*STATUTE 15 & 16 VICT. CAP. LXXVI.

CXVII. Either party may call on the other party by notice to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the judge shall certify that the refusal to admit was reasonable; and no cost of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is in the opinion of the Master a saving of expense.

CXVIII. An affidavit of the attorney in the cause, or his clerk, of the due signature of any admission made in pursuance of such notice, and annexed to the affidavit, shall be in all cases sufficient evidence of such admissions.

CXIX. An affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served.

CCXXII. It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.

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- | | |
|--|--|
| I. Form and obligation generally. | X. Protest. |
| (a) What is a Bill of Exchange. | XI. Notice of dishonour. |
| (b) What is a Promissory Note. | (a) Notice by any party accrues to benefit of all. |
| (c) Place of making. | (b) Who entitled to notice. |
| (d) Place for payment. | (c) Due diligence in giving notice. |
| (e) Parties to. | (d) Manner of giving notice. |
| (f) Other matters relating to. | (e) Form of notice. |
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| III. The stamp. | (g) Want of notice, how excused. |
| IV. The acceptance. | XII. Bankers. |
| V. Presentment for acceptance. | (a) Liability, where taking lost or stolen note. |
| VI. Acceptance supra protest. | (b) Payment of forged bill or check. |
| VII. Transfer. | (c) Payment of checks and bills. |
| VIII. Presentment for payment. | (d) Liability and duty in other respects. |
| (a) Generally. | (e) Lien of bankers. |
| (b) Time within which Bills, Notes, and Checks, must be presented. | (f) Interest. |
| (c) Place at which presentment must be made. | (g) Appropriation of bills or notes. |
| (d) The hours within which presentment for payment should be made. | (h) Other matters. |
| (e) Days of grace. | XIII. Consideration. |
| IX. Payment. | (a) Illegal consideration. |
| (a) Restrictive indorsement. | (b) Want of consideration generally. |
| (b) Notice of application of bill to a particular account. | (c) Accommodation paper. |
| (c) Payment for honour. | (d) Proof of consideration. |
| (d) Evidence of payment. | |

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|--|--|
| (e) Pleadings. | (f) Trover for lost or stolen bill or note. |
| XIV. Release of parties to bill or note. | (g) Who may be sued. |
| (a) Giving time. | (h) Affidavit to hold to bail. |
| (b) How acceptor or maker discharged. | (i) Debt. |
| XV. Satisfaction of bill or note. | (k) Trover. |
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| (c) Recovery where bill or note lost or stolen. | (o) Amount recoverable. |
| (d) Recovery by bona fide holder of lost or stolen note. | (p) When party may resort to original consideration. |
| (e) Recovery of proceeds of lost or stolen note or bill. | (q) When recovery may be had on common counts. |

XVII. Other matters.

I. FORM AND OBLIGATION GENERALLY.

(a) WHAT IS A BILL OF EXCHANGE.

Instrument drawn payable on a contingency, not a bill. *Palmer v. Pratt*, ix. 538; 2 Bing. 185. *Ralli v. Sarell*, xvi. 422; 1 D. & R. 33.

Instrument treated as a bill, where an obviously supplied omission is made. *Phipps v. Tanner*, xxiv. 669; 5 C. & P. 488.

An order to pay money "provided certain terms are complied with," not available as a bill. *Kingston v. Long*, xxvi. 308; 4 Doug. 9.

The order of time in which the names of the drawer and acceptor of a bill are placed upon it is immaterial. *Molloy v. Delves*, xix. 617; 4 C. & P. 492. S. C. xx. 194; 7 Bing. 428.

Bill may be accepted and indorsed, before drawn. *Schultz v. Astley*, xxix. 655; 2 B. N. C. 544.

But a blank acceptance for a certain sum, altered by the drawer before drawing into a smaller sum, is not a drawing of the bill for the sum expressed in the acceptance. *Baker v. Jubber*, xxxix. 724; 1 M. & G. 212.

Words "value received" not essential to constitute a bill of exchange. *White v. Ledwick*, xxvi. 454; 4 Doug. 247.

A paper containing a request for the payment of money, but not purporting to be made by one having a right to call on the other to pay, is not a bill of exchange. *Little v. Slackford*, xxii. 498; 1 M. & M. 171.

There must be a drawer to a bill. *Vyse v. Clarke*, xxiv. 626; 5 C. & P. 403.

Instrument drawn, payable to drawer or order at a particular place, without being addressed to any person by name, if afterwards accepted by one at the place where made payable, may be declared upon as a bill of exchange. *Gray v. Milner*, iv. 361; 8 Taun. 739.

Bill at sight is not a bill payable on demand, within exception in stat. 22 G. 3, c. 49. *Janson v. Thomas*, xxvi. 276; 3 Doug. 421.

Drawn payable ninety days after sight or when realized is not a bill within custom of merchants. *Alexander v. Thomas*, lxxi. 332; 16 Q. B. 333.

Acceptance in blank for drawer and payee's name not a bill. *Stoessiger v. Railway*, lxxvii. 548; 3 E. & B. 549.

"Fifty-three days after date credit A. or order 500*l.* in cash on account of," signed by managing director of company, is a bill of exchange. *Ellison v. Collingridge*, lxvii.; 9 C. B. 570.

Dividend warrant not negotiable. *Partridge v. Bank*, lviii. 396; 9 Q. B. 396.

Exchequer bills are negotiable passing by delivery. *Brandao v. Barnett*, liv. 518; 3 C. B. 519.

Statement of deposit of leases as security in the body of the note does not affect its negotiability. *Fancourt v. Thorne*, lviii. 310; 9 Q. B. 311.

Instrument in form of note with address in the corner and accepted by that party, may be treated as his acceptance or the note of the drawer. *Lloyd v. Oliver*, lxxxi. 18 Q. B. 471.

(b) WHAT IS A PROMISSORY NOTE.

Not necessary that a promissory note should be in itself negotiable. *Rex v. Box*, i. 635; 6 Taun. 325.

It is sufficient that it is a note for the certain payment of a sum of money, whether negotiable or not. *Ibid.*

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